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CASES

ARGUED AND ADJUDGED

IN THE

High Court of Chancery,

ORIGINALLY PUBLISHED BY ORDER OF THE COURT,
FROM THE MANUSCRIPTS

OF

THOMAS VERNON,

LATE OF THE MIDDLE TEMPLE, ESQ.

WITH REFERENCES

TO THE

PROCEEDINGS IN THE COURT, AND TO LATER CASES;

TOGETHER WITH TABLES OF THE

Names of the Principal Cases, and of the Cases cited in the Notes;

ALSO, OF

THE PRINCIPAL MATTERS AND OF THE MATTERS CONTAINED IN THE NOTES.

BY JOHN RAITHBY,

OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

THE THIRD EDITION,
WITH REFERENCES CONTINUED TO THE PRESENT TIME.

IN TWO VOLUMES.

VOL. I.

LONDON:

JOSEPH BUTTERWORTH AND SON,

43, FLEET STREET.

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WE do allow and approve of the Printing and Publishing of the Cases argued and adjudged in the High Court of *Chancery*, as they are collected by *Thomas Vernon*, late of the *Middle Temple*, Esq. well knowing the great Learning, Ability, and Judgment of the Author.

KING, C.
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R. EYRE.
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TO THE

RIGHT HONORABLE PETER LORD KING,

BARON OF OCKHAM,

LORD HIGH CHANCELLOR OF GREAT BRITAIN.

HAVING, in obedience to an order of that Court, where your Lordship now presides, supervised and fitted for the press *one* volume of Mr. Vernon's Reports, we beg leave to lay it before your Lordship; and this we the rather presume to do, that by prefixing your Lordship's name to this Work, we may do justice to the memory of that great man, whose abilities in his profession were so well known to your Lordship.

These Reports, how useful soever they may be in themselves, would have been much more valuable, if they had been brought down to your Lordship's time, and had taken in the decrees, which are made by your Lordship with such distinguishing judgment, and so impartial a regard to the rules of Justice and right reason.

His Majesty in entrusting your Lordship with the custody of the Great Seal, has no less gratified the desires of his people, than given a convincing proof, (if any can be wanting after what His Majesty has already done) how much he consults the public welfare: and when it is considered how agreeable His Majesty's choice of a Chancellor has been to the whole nation; your Lordship, we hope, will permit us

to say, there must be something very uncommon in a person, in whom the differing sentiments of all parties so entirely unite.

May your Lordship long enjoy the Honours, which you have so deservedly acquired, and may those labours which are sustained by your Lordship with such unwearied patience for the public good, be attended with success suitable to the zeal with which they are undertaken.

We are,

Your Lordship's

Most dutiful, and Most obedient Servants,

Wm.-Peere Williams.

William Melmoth.

TO THE

RIGHT HONORABLE JOHN LORD ELDON,

&c. &c. &c.

MY LORD,

THE pleasure I felt in the reflection that this edition of Vernon was undertaken and nearly completed under your Lordship's auspices, received the highest addition when you permitted me to declare to the world that you considered the endeavour to restore his Reports with accuracy, as worthy of your countenance.

Whilst I return your Lordship my respectful thanks for the honour you have conferred on me, I think it my duty to assure you, that I have omitted no exertion to render the Work, in some measure, worthy of it, and to promote, so far as the very limited sphere of my powers would permit, the noble aim of your Lordship to settle the principles that ought to regulate the decisions of the Court of Chancery.

As your labours for this great end have been singular for the high characteristics of sincerity, wisdom, and learning, so it is a subject of the warmest satisfaction to every Member of the Profession, to

perceive that you possess in your retirement, not only the pleasures which flow from a consciousness of Integrity, but the felicity also of contemplating in your Successor a person whose judgment will enable him to appreciate your motives, and whose talents have already procured him a name amongst the eminent Lawyers of his country.

That your Lordship may long continue to enjoy a reward so congenial with purity of intention, and with the sentiments of great men in all ages, is the sincere wish of,

My Lord,
Your Lordship's
Much obliged and Most obedient Servant,
JOHN RAITHBY.

PREFACE.

THE Name of VERNON, as a Lawyer, has for a series of years been in high repute, and his Reports, whether that name or the names of those who decided the Cases they record, or the importance of many of those Cases be considered, must ever be regarded as a collection of authority of no mean value: It has long, however, been a subject of regret, that they have been found deficient in accuracy; to remedy that defect, and to render them as extensively useful as they are otherwise intrinsically valuable, is the view of the present Edition.

It would, doubtless, be a great benefit to the Profession of the Law, and to the Public at large, if such a Work were undertaken by a person of experience; but it is hardly to be expected that they, who have acquired knowledge by the practice, or learning by the study of many years, will be induced to undertake a task, which, it must be confessed, cannot, from its nature, hold forth great temptation to engage in it either to successful exertions or disappointed hopes.

These considerations, together with a strong desire to render himself, in some degree, useful, must form the only apology the Editor has to make for presenting to the Public a work, for which he fears neither his experience nor his learning in the doctrines of legal equity have yet sufficiently qualified him; unless he may be permitted to add, that he has endeavoured to compensate for his deficiencies in these respects by the utmost exertions of industry within his power.

As to the plan upon which the present Edition proceeds, it may be proper to mention, that the Editor has proposed to himself that which Mr. Cox has published of PEERE WILLIAMS's Reports, as his general model. It is not in his power to give a clearer account of his design than that Gentleman has given of his own in his Preface to the Fifth Edition of that valuable Work, to which, therefore, he begs to refer the Reader; and if the system of that Work has been in some degree enlarged upon in the present, by giving the principles and general tendency of the Cases cited in the Notes, more frequently, and the Extracts from the Register's Book more at length, he has been induced so to do, in particular as to the latter, by the necessity of the case, and on the whole by the hope that thereby the attention of the inexperienced Student may be more readily drawn to the point in question, and the necessary information yielded whenever a case may be cited in Court, and the Book in which it is reported not immediately at hand.

The Profession should also be apprized, that

whenever the same Cases are reported in PEERE WILLIAMS and VERNON (which happens somewhat frequently towards the latter end of the Second Volume of VERNON) the Editor has thought proper to avoid tracing the same path of References; but where Mr. COX has made no mention of the Register's Book he has renewed the search in the hope of better fortune; and it has been his aim, in every instance, to bring the Cases on the various points occurring in these Volumes, down to the latest discussion of the subject.

It is unnecessary to entreat a learned and dignified Profession to regard the attempt now respectfully submitted to them, with kindness and candour; but this Work ought not to be sent into the world without bearing with it a particular acknowledgment of the assistance that has been afforded to the Editor, by some Gentlemen of the Bar, who became acquainted with his design.

ADVERTISEMENT

TO THE

THIRD EDITION.

THE Additions now made to the Notes are placed between brackets; and in the INDEX OF CASES REFERRED TO BY THE NOTES, the additional Cases are printed in *Italics*.

A

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DE

TERM. S. HILLARII, 1680.

IN CURIA CANCELLARIÆ.

Lord Chancellor NOTTINGHAM. 11 Feb. 1680.

THOMAS TIFFIN, Brother and Heir of Robert Tiffin, ... } Plaintiff;
MARIA TIFFIN, Executrix of Robert Tiffin, Crick, and Groome, ... } Defendants.

2 Ch. Ca. 49. 55. Eq. Ca. Ab. 241. pl. 1. 274. pl. 8.

ROBERT TIFFIN purchased the lands in question, and took the fee in his own name, and an assignment of the mortgage term for years in the names of the defendants, *Crick* and *Groome*, in trust; and made his wife, the defendant *Maria*, executrix. The plaintiff, as heir, brought this bill for an assignment of the term; for that it was to attend the inheritance.

A man purchases land and takes the fee in his own name, and an assignment of a term in a trustee's name; the term shall attend the inheritance, though not said in the assignment it should do so.

The defendant, the executrix, insisted, there was no mention in the assignment that the term was to attend the inheritance, and that it was a term in *gross*, and ought to be enjoyed as a chattel; and was assets.

Lord Chancellor. A term in the owner is assets at law, but a term in trust is not to be made assets in equity; and it would be dangerous to purchasers to make it so: and cited the case of *Greene* and *Lambert*, where it was adjudged the custom of *London* should not prevent the attendance of a lease on the inheritance: and decreed the trustees to assign the term to attend the inheritance.(1)

[2]

The custom of London shall not prevent the attendance of a term on the inheritance. *Vide post Dowse* v. *Percival*, *Case* 92.

(1) Reg. Lib. 1680. B. 201. Every term standing out is at law a term in gross, but in equity it may be made to attend the inheritance, either by express declaration or implication of law. *Scott* v. *Fenhoulet*, 1 Br. Ch. Rep. 69. And no difference whether the term or the inheritance be first in the ancestor. *Langton's* case, 2 Cha. Ca. 156. *Dowse* v. *Percival*, post p. 104. Nor whether the legal estate is in *cestui que trust* or trustee, where there is a covenant to convey the legal estate, for there equity considers it as actually conveyed, and

the term attendant only upon the inheritance. *Cooke* v. *Cooke*, 2 Atk. 67. So where term created, and particular trusts declared thereof, as for payment of debts, raising portions, &c. and no limitation after trust satisfied, and those trusts are expired, the term shall attend the inheritance. Arg. *Bladon* v. Earl of *Pembroke*, Ch. Rep. 168. *Bodmin* v. *Vandebendy*, 2 Ch. Cas. 172. *Anon.* 2 Vent. 359, 361. *Gore* v. *Black*, cited in *Levet* v. *Needham*, post 2 vol. 139. *Best* v. *Stampford*, post 2 vol. 520. 1 Salk. 154. *Goodright* v. *Sales*, 2 Wils. 329. So where a tenant in fee makes a lease for years without any consideration, and continues in possession, and declares no trust concerning the term, the term shall attend the inheritance. *Anon.* 2 Vent. 359. So though a term taken in be expressly limited to the owner of the fee, his *executors and administrators*. *Best* v. *Stampford*, *Goodright* v. *Sales*, ub. sup. so in the case of a settlement for a valuable consideration, if a term be created therein, and no uses declared, it shall attend the inheritance. Per *Hardwicke*, C. *Brown* v. *Jones*, 1 Atk. 191. Contra, it seems has been decreed in cases of voluntary settlements and wills. ibid. So where lands escheat to the King, he shall have the benefit of the term to attend the inheritance. *Thuxton* v. *Attorney General*, post 341, cited in Lady *Bodmin* v. *Vandebendy*, post 357. So a lease shall be deemed to attend the inheritance if it appears that the parties intended it should do so. Sir *George Sand's* case, 2 Freem. Rep. 131. more fully reported Hard. 494.; sed vide *Scott* v. *Fenhoulet*, 1 Bro. Ch. Rep. 68.; et vide as to distinction taken between term and trust of a term, *Hunt* v. *Baker*, 2 Freem. 62. Sir *George Sand's* case, ub. sup. and contra, *Peacock* v. *Spooner*, 2 Freem. 114., affirmed on appeal in Dom. Proc. as to which latter case see *Garth* v. *Baldwin*, 2 Vez. 660. And where the whole interest in the term cannot be conveyed to a vendee, (tho' the intention to purchase the whole be clear) it seems an express declaration is necessary to make the term attend the inheritance, *Scott* v. *Fenhoulet*, on a re-hearing, ub. sup. Where a term is assigned in trust to attend the inheritance, it will, in equity, follow all the estates created thereout, and all the incumbrances subsisting upon such inheritance. Sir *George Sand's* case, ub. sup. *Charlton* and *Low*, 3 P. Wms. 330. *Willoughby* v. *Willoughby*, Amb. 282. 1 T. R. 763. And trustees of a term in a mortgaged estate held in trust for mortgagor, on concealment of the term, held trustees thereof for the mortgagee. *Charlton* and *Low*, ub. sup. And it is considered as a part of the inheritance, and cannot be disannexed in this court. *Villiers* v. *Villiers*, 2 Atk. 72. Nor in favour of an heir or executor, *Cooke* v. *Cooke*, 2 Atk. 67. Nor shall it be severed where the King extends the inheritance. *Nicholas* v. *Howe*, post 2 vol. 390. Contra if it be a term in gross, and assigned before actual extent, ibid. Vide also *Gerard Fleetwood's* case, 8 Rep. 171. Nor would the general words *I give all* all to *J. S.* in a nuncupative will, since the statute of Frauds, operate to disannex the term from the inheritance, so as to save it from becoming an escheat to the Crown, in the case of a bastard testator. *Thuxton* v. *Attorney-General*, post 340. But the term may be severed in behalf of creditors, *Cooke* v. *Cooke*, *Willoughby* v. *Willoughby*, ub. sup. *Goodright* v. *Sales*, 2 Wils. 331. And by the owner of the estate. Duke of *Norfolk's* case, 3 Ch. Ca. 23. *Willoughby* v. *Willoughby*, ub. sup. And *that* under a limitation which, though void at law, shews an intention to sever. *Nourse* v. *Yarworth*, Finch. Rep. 160. *Hayter* v. *Rod*, 1 P. Wms. 376. And for the reasoning and distinctions taken on this doctrine by Lord Commissioner *Raymond*, vide *Whitchurch* v. *Whitchurch*, 9 Mod. 124. Gilb. Rep. 168. *vide etiam.* Co. Lit. 290 b. Butler's note (1) XV. As to the principle on which courts of equity declare terms to be attendant on the inheritance in the cases of a term raised by the owner of the lands, for payment of debts and of leases for years, without consideration, and parting with the possession, and without any trust declared concerning the term, vide *Powell's* Law of Mortgages, p. 486, 511, and cases cited there. For the present state of the doc-

trine at law, as to satisfied terms, set up in trial on ejectment, and as to the presumption of an assignment on satisfaction of such terms, vide *Doe* on dem. of *Hodsden* v. *Staple*, 2 Term. Rep. B. R. 684. *Doe* on dem. of *Da Costa* v. *Wharton*, 8 Term. Rep. B. R. 2., which confine the doctrine to the rules of law, in contradistinction to the equitable principles and distinctions attempted to be introduced in the cases of *Goodtitle* on dem. of *Norris & al.* v. *Morgan & al.* 1 T. R. 755., and *Doe* on dem. of *Bristow* v. *Pegge*, 1 T. R. 758. n. in which the rule was extended to the case of a confessedly outstanding unsatisfied term: and for observations of Lord *Eldon*, Chan. on the doctrine laid down in the latter two of those cases at law; vide *Evans* v. *Bicknell*, 6 Ves. 184. [See also on the subject of terms attendant, *Whitchurch* v. *Whitchurch*, 2 P. Wms. 236. *Capel* v. *Girdler*, 9 Ves. 509. *Reynolds* v. *Jones*, 2 S. & S. 213.]

DE

TERM. PASCHÆ,

[3]

Ann' Regn' Car. II. Regis 33, *Annoque Dom.* 1681.

IN CURIA CANCELLARIÆ.

Case 2.

Eq.Ca.Ab.211. pl. 20. 2 Vent. 351. 2 Ch. Ca. 51. S. C.

WINN *versus* LITTLETON.

A man seised in fee of divers lands and having also lands mortgaged to him, devises all his lands to *A.* and his heirs, the mortgaged lands did not pass.

WINN being seised of divers lands in fee in the several counties of *G. M.* and *D.* within the dominion of *Wales;* and having likewise divers other lands in other counties within the dominion of *Wales* made over to him in mortgage, he by his last will devises all his lands in the counties of *G. M.* and *D.*(1) to Sir *John Winn* and his heirs, and devises a rent-charge of 80*l. per annum*, issuing out of the same lands, and then bequeaths divers legacies to the value of 1,500*l.* And then comes this clause in his will, viz. *The residue of all my personal estate I give to my loving* ——, executor, (leaving a blank for the name of his executor) and upon this will the question was, Whether the lands he had in mortgage should pass to Sir *John Winn* by the devise of all his lands; or whether the Lady *Littleton*, who was next of kin, and was his administratrix, should have them?

---

(1) Or *elsewhere*, within the dominion of *Wales*.

WINN v. LITTLETON. [4]

Upon hearing counsel, it was decreed, *per* Lord *Chancellor*, for the administratrix. And in this case it was declared by the Lord *Chancellor*, that always, when a mortgagee dies, and makes no devise of the lands he has in mortgage, they shall go to the executor. And in *London* there is this special custom, That lands in mortgage are always reckoned the personal estate of the mortgagee, he being a citizen.(1) And as to the principal case, it was observed,—

1. That the testator doth make special mention of the three counties in which his own lands of inheritance lay, but not of the counties in which the mortgaged lands lay, but adds a general clause *currente calamo, or elsewhere within the dominion of Wales;* and having thus descended to particulars, he has thereby so limited and circumscribed his intention, that the general *fortuitous* clause cannot open or enlarge it, for that is but in the nature of an *et cætera*, and may serve to fetch in small parcels of land that were the testator's own inheritance, that lie out of the said three counties, if any such there are (as in truth in this case there were) but shall never reach the mortgaged lands, which are of a different nature; and the rather, for that in this case the mortgaged lands were of great value, and equivalent to, if not exceeding, the value of his other lands, and therefore

---

(1) At the common law if the defeazance of a mortgage appoints the money to be paid either to heirs or executors disjunctively, there the mortgagor may elect to pay it to the heir or executor, as he pleaseth, *Thornborough* v. *Baker*, 1 Ch. Ca. 283. Co. Lit. 210 a. but if he doth not elect it shall belong to executor, *Thornborough* v. *Baker*, ub. sup. No doctrine, however, seems to be more clearly settled than that the estate of the mortgagee in fee, (not in possession, and equity of redemption not foreclosed or released) [as to which see *Attorney General* v. *Vigor*, 8 Ves. 256.] in the mortgaged lands, is considered as personal estate, *Fisk* v. *Fisk*, Prec. Ch. 11. *Awdley* v. *Awdley*, post 2 vol. 192. *Howell* v. *Price*, 1 P. Wms. 295, and cases cited in not. there. So though two descents cast, *Tabor* v. *Grover* on appeal, post 2 vol. 367. Contra, if intention of testator mortgagee in possession, appear. *Fisk* v. *Fisk*, ub. sup. *Noys* v. *Mordaunt*, Prec. Ch. 265. post 2 vol. 581. So if forfeited and in possession, *Cotton* v. *Iles*, post 271. Eq. Ca. Abr. 327., et vide *Turner* v. *Crane*, post 171., *Canning* v. *Hicks*, post 412, and cases cited in not. there. But mortgage in fee, though forfeited, will not pass by the general words "all my lands, tenements and hereditaments," *Strode* v. *Russel*, post 2 vol. 625. Nor though the equity of redemption is afterwards, [*i. e.* after the making of the will] foreclosed or released, ibid. But by a devise of "all my mortgages," the mortgaged lands will pass. *Creper* v. *Grysill*, Cro Car. 37. As to trust estates, with power of appointment, passing by a devise of all my estates, &c. in *B.* and *C.* or elsewhere in the kingdom of England, after payment of my debts, held not to pass, *Reade* v. *Reade*, 8 T. R. 118.

must not pass *by such a general clause, as if they were only skirts and members of the other lands.*(1)

WINN v. LITTLETON.

(1) But in the case of *Chester* v. *Chester*, 3 P. Wms. 56., where one devises all his lands in *A.*, *B.*, and *C.*, three distinct towns, and elsewhere, and had lands of much greater value than those in *A.*, *B.*, and *C.*, in another county, the lands in the other county were decreed to pass by the word *elsewhere;* and by Lord Chancellor *King*, assisted by *Raymond*, Ch. J. and other judges, the word *elsewhere* was the same as if the testator had said he devised all his lands in the three towns particularly mentioned, or in any other place whatsoever. Mr. *Cox*, in a note on this case, in his valuable edition of P. Wms. has cited several other cases, in support of this construction, but cites the case of *Strong* v. *Teatt*, Burr. 912. and 5 Bro. P. C. 496. with a *vide tamen*. The words there, after the particular devise, are "all other the lands, tenements, and hereditaments, in the said counties of Tyrone and Meath, whereof I am seised, with the appurtenances," and the question was whether a reversion would pass thereby, and agreed it would, if unrestrained by other words, directly expressed, or by the meaning to be collected from the will; but there were such words or expressions in that case, and so held on writ of error, from K.B. in Ireland, and affirmed on writ of error, in Dom. Proc. that reversion did not pass. [See also *Fletcher* v. *Smiton*, 2 T. R. 656. *Sheffield* v. *Mulgrave*, 5 T. R. 571. *Roe* v. *Reade*, 8 T. R. 118. *Doe* v. *Meakin*, 1 East, 456. *Goodright* v. *Downshire*, 2 Bos. & P. 600. *Doe* v. *Wetherby*, 11 East, 322. *Attorney-General* v. *Vigor*, 8 Ves. 256.] As to the effect of the word *elsewhere*, in the case of lands not purchased at the time of making the will, vide *Guidot* v. *Guidot*, 3 Atk. 254. And see the principal case reported, 2 Vent. 351. by the name of Sir *Thomas Littleton's* case. A devise by mortgagee of all and every his real estates to *A.* and his heirs, will pass the legal estate in mortgaged premises. *Marlow* v. *Smith*, 2 P. Wms. 198. *Attorney-General* v. *Phillips*, in Can. 16 Nov. 1767. but by Lord *Hardwicke*—By a devise of all lands, tenements, and hereditaments a mortgage in fee shall not pass. *Casborne* v. *Scarfe*, 1 Atk. 603. vide however, as to the distinction between the passing of the legal and beneficial interests of mortgagee in mortgaged premises, Har. & But. Co. Lit. 203 b. not. 96. and Mr. *Sanders'* note to *Casborne* v. *Scarfe*, ub. sup. and cases there cited. By the later cases, it seems, that the legal estate in mortgaged premises will not pass by general residuary devise by mortgagee, of all his estate and effects, whatsoever and wheresoever, to *A.* and his heirs, &c. Duke of *Leeds* v. *Munday*, 3 Ves. 348. Also *ex parte Sergison*, 4 Ves. 147. in which case, though the *Lord Chancellor* and the *Master of the Rolls* inclined to think the mortgaged estate passed by the general devise, yet the Master's Report, containing a contrary judgment, was confirmed. [But see contra, *Roe* v. *Reade*, ub. sup. *Braybrooke* v. *Inskip*, 8 Ves. 417. *Ex parte Morgan*, 10 Ves. 101.] But where the will of mortgagee was as to such manors, lands, and premises, wherein the testator was possessed of any estate for any term or terms of years, he declared and appointed that the trustees therein named, their executors and administrators, should stand possessed thereof, in trust from time to time to assign the same to such person or persons as should be intitled to the actual possession of his lands of inheritance, by virtue of the limitations therein contained, it was held by *Loughborough*, Chan. that several very old mortgages for terms of years, and also a mortgage in fee, should, on account of length of time, pass by the will, though defendant by her answer stated, that she did not believe there ever had been a release of the equity of redemption, in

WINN v. LITTLETON.

2dly. For that he by his will hath charged the lands, that pass by this devise *(of all his lands)* with a rent-charge for life, and no man can be thought so improvident as to grant a rent, for so great an estate and of so long a continuance as for life, out of lands which are every day redeemable; although it was answered, that when the mortgage should be redeemed, every one should have part of the money *pro rata* for their several interests. (1)

3dly. Suppose the devise had been of all his lands in the said three counties, as in this case it was, and then without more he had said, that the rest of his personal estate should [5] go to his executor, there perhaps the mortgaged lands should pass, for otherwise there would be nothing to answer and make sense of that clause, *and the residue of my personal estate,* &c. for that doth imply that he had already devised some part of his personal estate, or at least it shews, that he meant part of it should have passed: but as this case is, those words, *residue of his personal estate,* are without any such construction well understood and effectually answered; for before that clause in his will he had devised divers legacies, that in the whole did amount unto 1,500*l.* And forasmuch as the administratrix in this case was nearest of blood to the testator, and therefore as well intitled to the equity of this court, as the devisee, who was more remote in blood, although he was of the same name, and this being a case purely of construction, for that these mortgaged lands cannot pass to the one or other of them by the words of the will; and so there is construction against construction, and not a construction against the letter of the will. Hereupon it was decreed that the administratrix should have the said mortgaged lands. (2)

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any of the said mortgages. *Attorney-General* v. *Bowyer,* 3 Ves. 725. 5 Ves. 300.

(1) Vide *Brent* v. *Best,* post p. 70.

(2) Reg. Lib. 1680. B. fol. 452.

Case 3. The Earl of KINGSTON *versus* the Lady ELIZABETH PIEREPONT.

10,000*l.* left by will to procure a dukedom to the head of the family.

THE case was thus: *Gervase Pierepont* devises by his will 10,000*l.* to procure by all lawful means a *dukedom* to the head of his family, so that it be within a year after his de-

cease: And a bill was exhibited to have the money applied accordingly; but upon a demurrer, (1) it was adjudged against the plaintiff, as well, for that it is illegal to acquire honour for money, as also for that the bill was not exhibited within due time, so as to attach the money in equity within the year.

KINGSTON v. PIEREPONT.

(1) The demurrer was for that it is against law that such titles and honours which are properly the rewards of virtue and merit should be purchased for money, and that no agreement or disposition of any money, to any such purpose, ought to be aided or assisted by a court of equity, and for that a Peer of this realm, hath and doth rightfully hold and exercise a judicial power in judging and determining upon the rights and properties of the people of England, and it is therefore against the positive and established law of the land, that any judicial power should be bought or sold for money, or attained by such means, and for that it appears by the bill, that the said 10,000*l.* is by the testator's will appointed to be disposed of for that purpose, so as the same was effected and completed in such manner as by the said will is directed, and for that it appears that the said Marquis did survive the testator above one year, and did nothing toward attaining the said honour, and the plaintiff had no pretence during the life of the said Marquis, and for that the time by the will appointed for the procuring the said honour appears by the Bill to be effluxt, and for that it appears by the Bill that in case the honours were not procured in a year after the testator's death, then the 10,000*l.* is given over to others, and for that the Bill in that matter is against equity and common justice. His Lordship thereupon, &c. held the said several demurrers to be good and sufficient, and as to so much of the Bill as was demurred to, the same was dismissed. Reg. Lib. 1680. A. fol. 463. A title of honour cannot be barred by a fine or recovery. Lord Viscount *Purbeck's* case, Show. Ca. in Parl. 1. 1 Inst. 20. a. n. 3.

LOVE *versus* . . . . .

[6]

Case 4.

Eq. Ca. Ab. 160. pl. 4. S. C.

A freeman of London settles a jointure on his marriage, in lieu of his wife's customary share of his personal estate, and then by will gives two-thirds of his personal estate to his daughters, and one-third to his sons.

A CITIZEN of *London* being possessed of a personal estate to the value of 18,000*l.* and having made a competent jointure to his wife on his marriage, it was agreed that he might dispose of two-thirds of his personal estate by his will, *viz.* one third part, which would have belonged unto his wife, had he not made a settlement upon his marriage in lieu thereof, by which means her customary part comes to be at his disposal; and one other third part, which is the legatory part, which every citizen may dispose of by his will; (1) and having two

(1) It appears to have been doubted since this case (though certified in the case of *Hall* v. *Lumley*, 17 Car. 1. 1640. cited in *Hancock* v. *Hancock*, post 2d vol. 665.) whether, when the widow of a freeman was barred be-

LOVE v. .....

sons and two daughters, he makes his will, and by it devises two-thirds of his whole estate to his daughters, and one-third to his sons. Hereupon the chamber of *London* would have distributed his estate in this manner: first, to make an equal division of the customary part, *viz.* of 6,000*l.* amongst all the four children, which was 1,500*l.* a-piece, and then allot two-thirds of the residue to the daughters, and one-third to the sons; so that by this division each daughter should have only 5,500*l.* and each brother should have 3,500*l.* But the *Lord Chancellor* declared, that the intent of the testator did to him plainly appear to be, that his daughters should have two entire thirds of his whole estate, which is 6,000*l.* a-piece; and it was decreed accordingly.

In what manner the division shall be made.

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fore marriage of her customary part, and such freeman died leaving one or more child or children, the orphanage part of his personal estate was a moiety, or only a third? vide *Green* v. *Green*, at the Rolls, Hil. 1718. *Blunden* v. *Barker*, 1 P. Wms. 646. *Pusey* v. *Desbouverie*, 3 P. Wms. 320. but it seems now to be settled that in such case the orphanage part is a moiety, it being considered as if there was no wife in the case, *Hancock* v. *Hancock*, ub. sup. *Cleaver* v. *Spurling*, 2 P. Wms. 527. *Metcalf* v. *Ives*, 1 Atk. 63. *Morris* v. *Burroughs*, 1 Atk. 403. *Read* v. *Snell*, 2 Atk. 644. *Tomkyns* v. *Ladbroke*, 2 Vez. 592. and cases there cited. And no difference whether by settlement or will. *Read* v. *Snell*, ub. sup. So settlement by freeman on wife, to take effect after the death of the freeman, and not mentioned to be in bar of her customary part, shall nevertheless bar her. *Lewin* v. *Lewin*, 3 P. Wms. 15. So a jointure, though of land, shall bar the wife. *Hancock* v. *Hancock*, ub. sup. *et vide* stat. 11 Geo. 1. cap. 18. s. 17.

DE

TERM. S. TRINITATIS,

33 *Car' II. Regis.*

IN CURIA CANCELLARIÆ.

[7]

Case 5. Sir EDWARD TURNER's Case.

Eq. Ca. Ab. 58. pl. 2. S. C.

A feme possessed of a trust of a term, marries.—The husband may dispose of it.

MEMORANDUM; that about *Michaelmas* last it was adjudged in an appeal in the House of *Lords*, in the case of Sir *Edward Turner*, that a term being assigned in trust for a feme by her former husband, and she afterwards inter-

marrying with the late Lord Chief Baron *Turner*, who aliened the term, that the same was well passed away, and that the husband might dispose thereof; and my *Lord Chancellor's* decree was thereupon reversed. (1) But it was agreed, that where a term is assigned in trust for a feme by the privity and consent of her husband, there without doubt the husband cannot intermeddle or dispose of it. (2)

TURNER'S Case.

Otherwise, if the term is assigned in trust for the wife with the privity of the husband. *Vide post Pitt* v. *Hunt, Case* 10.

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(1) For the ground of this decision vide *Jewson* v. *Moulson*, 2 Atk. 421. So *Packer* v. *Windham*, Pre. Chan. 419. *Pitt* v. *Hunt* post 18. *Walter* v. *Saunders*, Trin. 1703. Eq. Ca. Ab. 58. pl. 5. *Tudor* v. *Samine*, post 2 vol. 270. 2 Eq. Ca. Ab. 89. pl. 15. and the same doctrine fully recognized in *Bates* v. *Dandy*, 2 Atk. 208. *Incledon* v. *Northcote*, 3 Atk. 434. *Worrall* v. *Marlar*. *Bushnan* v. *Pell*, before Lord *Thurlow*, Chan. Dec. 16, 1784. [1 Cox, 153.] cited in *Bosville* v. *Brander*, 1 P. Wms. 459. in not. So if a judgment be given to *A.* in trust for feme sole, who marries, and by consent of the trustee is in possession of the land extended on an elegit, the husband alone may assign over the extended interest. *Lord Carteret* v. *Paschal*, 3 P. Wms. 200. so if the feme be in possession of lands until a debt is due to her, and marries, ibid.

(2) A fortiori, he may not, if he make a lease for years to another, to the use of his wife, if she live so long. *Wiche's* case, Pasc. 8. Jac. Cam. Scacc. *Bates* v. *Dandy*, ub. sup. et vide *Pitt* v. *Hunt*, post 18. where said, however, by *Nottingham*, Lord Chancellor, that to prevent the husband, he must be a party to the assignment, et vide Vin. Ab. 4. p. 42. pl. 5, 6. But although the doctrine on this subject, as laid down in the cases above cited, appears to be now established, yet it seems formerly neither to have been considered as law, nor to have met with favour since its establishment, vide *Doyley* v. *Perful*, before Lord Keeper *Finch*, 25 Chas. II. 1 Chan. Cas. 225. 2 Freem. 138. Sir *George Sands'* case, Hard. 448. *Walter* v. *Saunders*, ub. sup. *Pitt* v. *Hunt*, post 18. And the Court at this day will go so far as, upon circumstances, to restrain the husband from parting with the property of the wife. *Ellis* v. *Ellis*, before Lord *Loughborough*, Chan. 1793. MSS. *Roberts* v. *Roberts*, before the *Master of the Rolls*, 12th Feb. 1796. MSS. cited Supplt. Vin. Ab. 476. [S. C. 2 Cox, 422.] And a husband, cannot, by assigning his wife's property for a valuable consideration, bar her of any equity she may have in it. *Wenman* v. *Mason*, in note to *Bosville* v. *Brander*, 1 P. Wms. 459. *Jewson* v. *Moulson*, 2 Atk. 417. *Pope* v. *Crashawe*, 4 Bro. Chan. Rep. 326. *Like* v. *Beresford*, 3 Ves. 506. [*Hill* v. *Atkinson*, 4 Ves. 530. note. *Mitford* v. *Mitford*, 9 Ves. 100. *Wright* v. *Morley*, 11 Ves. 20. *Beresford* v. *Hobson*, 1 Madd. 373. *Elliott* v. *Cordell*, 5 Madd. 156. *Stamper* v. *Barker*, 5 Madd. 157. *Johnson* v. *Johnson*, 1 J. & W. 472. *Steinmetz* v. *Halthin*, 1 G. & J. 64.] with the exception, perhaps, of the trust of a term for years, per *Master of the Rolls*, *Macaulay* v. *Phillips*, 4 Ves. 19. vide also *Franco* v. *Franco*, 4 Ves. 528. As to the extent and effect of the husband's right, in the term of the wife, at law, vide Co. Litt. Tit. Remitter, 351 a. Mr. *Cox*, in the conclusion of his note to *Bosville* v. *Brander*, 1 P. Wms. 459. says, there seems to have been more doubt where the husband has assigned some particular chose in action or trust term of the wife, for a full valuable consideration, whether the court will impose any terms in favour of the wife, upon such particular assignee, than in the cases that have arisen between the wife, and the general assignees of the husband, and refers to several cases. In the princi-

pal case no mention appears of that subject; in *Pitt* v. *Hunt's* case, the *Chancellor* said "the provisions made for children are defeated by this new resolution," i. e. in *Turner's* case. In *Tudor* v. *Samine*, the circumstance that no provision had been made for the wife, was expressly urged as an argument against the decree sought by the plaintiff's Bill, sed *non allocatur*. *Packer* v. *Windham*, the wife was dead and no issue. *Walter* v. *Saunders*, was between the wife and the general creditors, and a term created for raising 400*l.* was held to be a term and not money; and in *Bates* v. *Dandy*, *Lord Chancellor* said, the husband might have disposed of the whole, but no mention of any terms in favour of the wife. As to any distinction between a term in trust to raise a sum of money for a woman, and a trust of the term itself, such distinction, though attempted to be made, was not attended to by the *Master of the Rolls*, in *Walter* v. *Saunders*. With respect to a distinction in the case of a particular assignment, between a trust term and a chose in action of the wife, vide *Packer* v. *Windham*, ub. sup. where *Lord Chancellor* says, "The bond, &c. was a chose in action, and not assignable by law, but a term for years was only a chattel real, which the husband might assign by law, without his wife, and so he might the *trust of such a term*, and consequently the money secured by it." "And a term for years, and consequently to every effect of disposition the trust of such a term, is a chattel real, and seems to have been considered in pari materia with choses in action, since it must, in either case, equally be the agreement of the parties to intitle the husband to the wife's choses in action, or her chattels real, if no disposition," *Salwey* v. *Salwey*, Amb. 693. So the husband may assign the wife's chose in action, or a possibility that the wife is intitled to, so that it be not voluntary, but for a valuable consideration. *Bates* v. *Dandy*, ub. sup. but a voluntary assignment by the husband, will alter the property. *Squib* v. *Wynn*, 1 P. Wms. 378.

Case 6.

NEWCOMB *versus* BONHAM.

Eq. Ca. Ab. 312. pl. 13. 2 Vent. 364. 2 Ch. Ca. 58. 159. S. C.

A mortgage is made redeemable during the life of the mortgagor only, yet his heirs shall redeem.

A MAN being seised of lands in fee, makes an absolute conveyance thereof to the defendant *Bonham*; but by another deed of the same date the lands are made redeemable upon payment of 1,000*l.* and interest at any time during the life of the grantor; and in case the lands should not be redeemed in his lifetime, then he covenants that the same should never be redeemed*. The grantor dies before the lands are redeemed, and his heir at law exhibits a bill to have a redemption.

[*8]

And in this case the mortgagor may be foreclosed in his own lifetime.

But *Vid. post Case* 212. 227. where this decree was reversed on a hearing *de novo*, and reversal affirmed in parl. 2 Vent. 364.

It was in proof in the cause, that the mortgagor had a kindness for the mortgagee, as being his near relation, and did intend him the lands after his death, and that the clause of redemption was put in only upon the account that the mortgagor was then a batchelor, and so might marry, and

have issue; but that his full intent was, that in case he died without issue the mortgagee should have the lands absolutely without redemption; and also that the said one thousand pounds was really the full value of the estate at the time of the conveyance, but it afterwards happened to be a good bargain, it being a reversion after two lives, and the two lives happening to die within a short time: and it was urged that the mortgagee run hazard enough, for that as it happened to be a good bargain, it might have been a bad one, and yet he had no covenant nor other remedy to compel the repayment of his money, for the mortgagor had time to redeem during life; and suppose the mortgagor should have lived thirty or forty years after the mortgage made, and then had come to redeem, as he might have done, there had been all the interest upon interest thereby lost, which comes to more than the principal.

The *Lord Chancellor* was of opinion, that although the mortgagor had time to redeem during life, yet the mortgagee might have compelled him to redeem, or have foreclosed him: and said that it was a general rule, *once a mortgage, and always a mortgage;* and in regard the estate was expressly redeemable in the mortgagor's lifetime, it must continue so afterwards, and therefore decreed an account and a redemption. (1)

Once a mortgage and always a mortgage.

See the case of *Howard* v. *Harris*, *post Case* 31. and 191.

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(1) And also per *Lord Chancellor*, that the deeds of lease and release being but a security, the same could not be extinguished by any covenant or agreement at the time of making the mortgage, Reg. Lib. 1680. B. 538. vide *Roscarrick* v. *Barton*, 1 Ch. Ca. 217. *Floyer* v. *Lavington*, 1 P. Wms. 268. where a mortgage of rent charge, redeemable by grantor, during his own lifetime was decreed not redeemable sixty years after, on Bill brought by the heir. N. B. In that case the rent charge fell short of the legal interest of the consideration money, 2*l.* per cent. So in the common case of mortgage, length of time is a bar, *Proctor* v. *Oates*, 2 Atk. 139. So on a bill brought forty-eight years after: decreed on appeal from the Rolls, *Mellor* v. *Lees*, Feb. 1742, 2 Atk. 494. And vide that case for the distinction taken by Lord *Hardwicke*, between an agreement or mortgage of a rent charge, issuing out of land, and of the land itself, et vide *Stone* v. *Byrne*, H. 1722, 2 Bro. P. C. 399. Vin. Ab. 15. p. 469. pl. 13, 14. [See farther on the subject of the bar to the right of redemption from length of time, *Rakestraw* v. *Brewer*, Mos. 189. *Leman* v. *Newnham*, 1 Vez. 51. *Bonney* v. *Ridgard*, 1 Cox, 149. *Toplis* v. *Baker*, 2 Cox, 118. *Whiting* v. *White*, 2 Cox, 290; Coop. 1. *Blewitt* v. *Thomas*, 2 Ves. jun. 669. *Lake* v. *Thomas*, 3 Ves. 22. *Hardy* v. *Reeves*, 4 Ves. 466. *Hansard* v. *Hardy*, 18 Ves. 455. *Barron* v. *Martin*, 19 Ves. 331; Coop. 191. *Reeks* v. *Postlethwaite*, Coop. 161. *Hodle* v. *Healey*, 1 V. & B. 536. *Cholmondeley* v. *Clinton*, 2 J. & W. 179, 191. *Christophers* v. *Sparke*, 2 J. & W. 234. *Price* v. *Copner*, 1 S. & S. 347. *Harrison* v. *Hollins*, 1 S. & S. 471. *Hovenden* v. *Annesley*,

2 Sch. & L. 636. *Burke* v. *Lynch*, *Blake* v. *Foster*, 2 Ba. & Be. 431, 573.] But in deeds of mortgage by which no forfeiture is created in case of non-payment of the money lent, as in the case of a common Welch mortgage, or of mortgagee in nature of tenant by elegit, length of time is no bar, there being nothing in such case for the statute of limitations to operate upon, unless the statute had run by mortgagee continuing in possession twenty years after the money had been paid off, and the courts of law and equity square their rules in the common case of mortgage, subject to forfeiture by the statute of limitations, *Yates* v. *Hambly*, 2 Atk. 362. and cases there cited, *Longuet* v. *Scawen*, 1 Vez. 406. [*Fenwick* v. *Reed*, 1 Mer. 125.] As to those acts whereby a redeemable interest may be rendered irredeemable, vide *Perry* v. *Marston*, 2 Bro. Rep. 397, and *Whiting* v. *White*, July 18th, 1792, cited in note there, and by which a redeemable interest may be revived and opened, *Edsell* v. *Buchanan*, 2 Ves. jun. 83. *Lake* v. *Thomas*, 3 Ves. 17. and cases there cited, and by which an absolute conveyance may be rendered redeemable, *Barrell* v. *Sabine*, post 268.

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[9] DE

Case 7.

TERM. S. MICHAELIS,

33 *Car' II.* 1681.

IN CURIA CANCELLARIÆ.

Eq. Ca. Ab. 276. pl. 1, 2. 3 Mod. 43. 2 Show. 171. 2 Ch. Ca. 70. S. C.

PRODGERS *versus* PHRAZIER.

The custody of an ideot cannot be granted to a man, his executors, administrators and assigns.

But *Vid. post Case* 129, where it was referred to a trial at law.

THE King by his letters patents grants to Sir *Alexander Phrazier* the custody of one *Bridgett Dennis*, an ideot, &c. by very full words. *Habend'* to Sir *Alexander Phrazier*, his executors, administrators and assigns, during the ideotcy of the said *Bridgett Dennis;* and now upon the death of Sir *Alexander Phrazier*, Mr. *Prodgers*, a bedchamber-man begs the custody of the said ideot, and obtains letters patents for the same. (1)

The point in this case argued by the council was, *whether the custody of an ideot can by law be granted to a man, his executors, administrators, and assigns.* And, 1*st.* a difference was taken and agreed on all hands between the case of an *ideot* and a *lunatic;* that in the case of a lunatic, it is

(1) It appears from the plea that Sir *Alexander* by his will gave and bequeathed the custody and government of the ideot and her estate to the defendant, and made defendant executrix, who proved the will. R. L.

only a trust in the king, and no profit by law intended him thereby; (1) but in the case of an ideot it is otherwise; for the king by his prerogative has an interest in the estate of the ideot, and a right to the profits thereof; and to that purpose was cited the *Statute de Prerogat' Regis:* (2) and it was urged by Mr. *Holt,* that where the King has a prerogative, it is intended for the King's advantage, and not for the benefit of the subject; and that the King has in this case a [10] prerogative, he cited *Dame* Hales's *Case,* where a man marries an ideot, and has issue by her, whereby he becomes intitled unto her estate during his life in his own right; yet if afterwards by office she be found an ideot, the King by his prerogative shall have the lands: (3) And it was resembled to the case of a *ward,* where *Littleton's* text is, that the wardship of a *tenant in capite* shall go to the executors; but otherwise of a wardship in *soccage:* and the reason is, that in the first case there is a profit by law intended to the guar-

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(1) As to lunatics, it is expressly declared by the statute *de Præ. Reg.* that with regard to lunatics, the King shall provide that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently with the profits of the same, and the residue shall be kept to their use, and be delivered to them when they shall come to right mind, so that such lands and tenements shall be in no wise aliened. And the King shall take nothing to his own use, and if the party die in such estate, then the residue shall be distributed for his soul by the advice of the ordinary, 17 Ed. 2. cap. 10. The residue is now distributed according to the statute. Lord *Wenman's* Case, 1 P. Wms. 702. 2 Shower, 171. Pl. 164. It is a rule never departed from not to vary or change the property of the lunatic, so as to affect the succession to it. *Ex parte* Marchioness of *Annandale,* Amb. 80. [S. C. 4 Bro. C. C. 235, note. See also *Awdley* v. *Awdley,* post 2 vol. 192. *Oxenden* v. *Compton,* 4 Bro. C. C. 231. 2 Ves. jun. 69.]

(2) The words of the statute in this case are, that the King shall have the custody of the lands of natural fools, taking the profits of them without waste or destruction, and shall find them their necessaries, of whose fee soever the lands shall be holden, and after the death of such ideot he shall render it to the right heirs, so that such ideots shall not alien, nor their heirs shall be disinherited. 17 Ed. 2. cap. 9. It appears that though the King had not this prerogative at common law, yet it was given him by some Act of Parliament, in the time of Edw. 1st. vide 2 Inst. 14. *Beverley's* Case, 4 Rep. 126. But the King has no right to the mesne profits of ideots' estate, till office found. *Beverley's* Case, ub. sup. But to some intent the office shall have relation to the time of the birth. *Tourson's* Case, 8th Rep. 170. And the King having but the custody of the ideot's lands, though during life, yet the freehold is not in the King, but in the ideot, *Beverley's* Case, ub. sup.

(3) As to relation of office, vide Plowd. 263, 1 Inst. 30 *b.* et vide Har. and But. note 175, for query and remarks on this head. And further as to the nature of office, vide *Page's* Case, 5 Rep. 52.

PRODGERS v. PHRAZIER.

dian or committee, and an interest vested; but in the other case, only a trust: and although estates at common law ought to have a certain commencement, and a certain determination; yet there are many interests of this nature allowed in law, and are called *incerta interesse;* as where land is extended against the heir upon the recognisance of his ancestor; the conusee is to hold until such time as the money shall be levied; and the grant of the goods of a person outlawed is, until the outlawry shall be reversed; and there are divers other cases of the like nature: and Mr. Serjeant *Maynard* put this case, where the King grants the custody of a ward *quam diu in manibus nostris extiterit,* that is, until such time as livery shall be sued. And it was said by Mr. *Wallop,* that this is only a private minute trust, and none of the great trusts; as are such as concern the administration of justice, or the King's revenue: and yet in a late case in the *Exchequer,* between *Squib* and ——— it was adjudged, that the office of a *Teller of the Exchequer* might be granted to one, his executors, administrators and assigns. And it was said by Sir *Francis Winnington* and Mr. *Pollexfen,* that although there had not been those words in the present grant, of *executors, administrators,* and *assigns,* yet the King having granted his interest *quamdiu* the said *Bridgett Dennis* should continue an ideot, it should have gone to the executors of the grantee. And it was observed, that the *Statute of the* 32 *of H.* 8., concerning the *Court of*

[11] *Wards and Liverys,* ranks ideots and wards in the same degree: and likewise that in *Fitz. N. B.* 139, and 232, the wardship of an infant, is called the custody of an infant, and that the words are synonymous, the one from the *French* and the other from the *Latin.*

And by the plaintiff's counsel it was insisted, that though 'tis true, where there is a profit and interest, the same may be transferred and granted over; yet this is an interest so linked and coupled with the trust of the care and maintenance of the ideot, which the law reposes in the King, as in the safest hands, that it cannot be granted over, otherwise than so as to be determinable at the King's pleasure.

To which it was replied, that there was no danger of a breach of trust, because it is for the party's benefit to preserve and maintain the ideot: and whereas it was objected, that this interest would not be assets in the hands of an executor; it was replied by Mr. Serjeant *Maynard,* that *that*

was *petitio principii*, if it be a profit and an interest, as without doubt it is, by consequence it must be assets.

The *Lord Chancellor* said, that he did not take the case of a *ward* and an *ideot* to be at all parallel cases; for the King had the one as a trust, though coupled with an interest; and the other purely as an interest, service, and duty owing to him, and comes to the King in point of tenure: and therefore the King may grant the custody of a ward *cum acciderit*, but there can be no such grant of the custody of an ideot; (1) but he said, if the emolument and advantage, that by law is given to the King in case of an ideot, could be separated from the trust, then clearly it might be transferred; but this is a case of great consequence and *primæ impressionis*, for no one can shew any such grant from the time of the making of the *Stat' de Prerogat' Regis* until this day: and it should be well considered, what inconveniency may arise in allowing of grants of this nature; for suppose the grantee makes an infant executor, or dies intestate, what shall then become of the custody of the ideot? But he said there was that in this case, that would make an end of it; for he had formerly seen the inquisition, upon which both these grants were founded; and it is thereby found that *Bridgett Dennis* had been an ideot for eight years last past, which is utterly a void inquisition; for an ideot must be found to be so *a Nativitate* (2) otherwise it is not an ideot, but a lunatic only; and both the letters patents, as well that to Sir *Alexander* [12]

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(1) But the King can grant the custody of the lands of an ideot to a person, his heirs, and executors, *Holme's* Case, Dyer 25. *Frances'* Case, Moor 4. pl. 12. As well those which he has by purchase as those which he has as heir by the common law. *Beverley's* Case, 4 Rep. 127. vide also judgment on this case at law, 3 Mod. p. 43. As to the nature and extent of the King's grant of the custody of the person and lands of the ideot to the *Lord Chancellor*, it appears that the power of the *Chancellor* in relation to ideots, as well as lunatics, is by virtue of a sign manual of the King upon his, the *Chancellor's*, coming to the Great Seal, and countersigned by the two Secretaries of State, empowering him to take care of such persons in right of the crown, and to make grants from time to time of the ideot's or lunatic's estates, and this is a beneficial thing in case of ideocy, because the King could not only give the custody of ideots, but the rents and profits of ideots' lands to persons, *Corporation of Burford* v. *Lenthall* and *Others*, 2 Atk. 553. *Sheldon* v. *Fortescue*, 3 P. Wms. 107. Note A. In matter of *Heli*, a lunatic, March 31, 1748, 3 Atk. 635. [*Oxenden* v. *Compton*, 2 Ves. jun. 71.] But after the custody is granted the Great Seal acts in all matters relative to a lunatic not under the sign manual, but by virtue of its general power, as keeper of the King's conscience. *Ex parte Grimstone*, Ambler 707.

(2) Vide Co. Lit. 247. *a*.

PRODGERS v. PHRAZIER.

Phrazier, as this latter to the plaintiff *Prodgers*, being founded upon this inquisition are both void: and my Lady *Phrazier* had best have a care lest she should be called to an account for the profits already received; and advised the parties to consider of it, and when they came next to produce the inquisition; and, if it could be, that they would end the matter by compromise.

At another day the case of *Vaine* and *Bier* (1) in the *Exchequer* was cited, where it was resolved, that the office of [*the registership of*] *policies of assurance* might be granted for years, against the opinion in Sir *George Reynolds's* case; (2) and *Squib's* case in the *Exchequer* cited, where it was resolved that the grant of a *teller of the Exchequer* to a man and his assigns was a good grant. But the *Lord Chancellor* relied much upon it, that there never was any precedent of the custody of an ideot granted to a man, his executors, administrators and assigns, as this case was: and he said *what never was, never ought to be;* and he said *that* was a good reason given by *Littleton* on the Stat' of *Marlebridge*. (3)

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(1) Quere *Veale* v. *Priour*, Hard. 351.

(2) Sir *George Reynel's* Case, 9 Rep. 95. et vide *Jones* v. *Clerk*, Hard. 46. *Dennis* v. *Loving*, ibid. 424.

(3) In this Case the letters patent were pleaded, but *Lord Chancellor* said the plea was insufficient, though the inquisition had been good and overruled accordingly, and then the decree proceeds as follows, "but the grant to "the plaintiff being on the same inqui- "sition as the grant to the defendant, "his Lordship, for the settling the "matter as to the custody of the said "Mrs. *Dennis*, and her estate, whether "an ideot or a lunatic, doth order that "she be brought before his Lordship "by the defendant within four days "after notice to be given to her of this "order, to the end that she, the ideot, "may be inspected, that the Court may "dispose of her in future as they shall "think fit." Reg. Lib. 1681. B. Fol. 86.

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[13]

Case 8.

Lord Nottingham, 21 June, 1681.

Eq.Ca.Ab. 255, pl. 2.

2 Ch. Ca. 63. 78. S.C.

Sir FRANCIS NORTH, Chief Justice of C. B. . . . . } Plaintiff.

WILLIAM WAY *et al'* Daughters and Coheirs of JOHN ADDINGTON, . . } Defendants.

JOHN ADDINGTON, seised in fee, conveys the lands in question to trustees, in trust that they should convey to such

Common recovery by *cestui que trust* in tail, bars the entail and all the remainders.

persons and for such estates as he should by will direct; and then makes his will, and thereby directs that the trustees should convey to *Thomas Addington* his son in tail male, remainder to *Richard Addington* brother to *Thomas*, in tail male, remainder to his own right heirs; which the defendants were, *Thomas* their brother being dead without issue.

Richard Addington being *cestui que trust* in tail, suffered a common recovery, and devised to his sisters *Champernoon* and *Way* to sell, to pay debts and legacies. They contract with the plaintiff to sell to him by articles; and he brings his bill to discover incumbrances, and what title the daughters and heirs of *John Addington* had.

They insisted on their remainder in fee by their father's will, and settlement; and that *Richard's* recovery was void, there being no good tenant to the freehold; and *Richard* having only the trust of an estate tail. (1)

For the plaintiff it was insisted, that if such a trust could not be barred, it might let in perpetuities.

Maynard said, he thought any common conveyance sufficient to dispose of such an estate: and in the case of *Washborne* and *Downs* (2) it was taken without question, that a recovery by *cestui que trust* barred the intail: but there being a jointure out, it was referred to the now *Lord Chancellor*, and 2,000*l.* was awarded her. And the case of *Goodrick* and [14] *Brown* was compounded: and it was said, there was a difference between a fine and recovery; because a fine does not bar the remainder.

For the defendant it was insisted, that the reason, why a common recovery bars, is the recompence in value, which cannot be here; nor can such a recovery be reversed for error, as at law. And there is the same reason for a fine, a feoffment, or bargain and sale to do it, as a recovery in this case: and if this recovery had been suffered by *Richard* in *Thomas Addington's* life, it would not have been good; and why should it be good now?

Lord Chancellor. Natural justice is the rule in chancery, and not the niceties of law in cases cognizable here: and there is no such thing as an estate tail of a trust; but it is created by and subject to the rules of this court: and said,

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(1) After length of time, tenant to the præcipe will be presumed. Sic dict. arg. *Webber* v. Earl of *Montrath*, 9 Mod. 145. And note a deed, &c. executed the same term shall be good to make a tenant to the præcipe, stat. 14 Geo. 2d. cap. 20. sec. 5.

(2) 1 Ch. Ca. 213, post 440.

NORTH v. WAY. he thought a feoffment and bargain and sale would work as a fine: but it was clear, a recovery would do it in equity; else by contrivance people might prevent alienation, by placing the legal estate in trustees: and declared, it had been always taken here, that such a recovery was good; and that *Bridgman* was clear of that opinion in *Washborne* and *Downs's* case: and *Lord Chancellor* decreed accordingly in this case, that the recovery was good. (1)

(1) "It being a general rule that "any conveyance or assurance made by "*cestui que trust* shall have the same "effect or operation upon the trust "estate as it should have had upon the "estate in law, if in case the trustees "had executed their trusts." Reg. Lib. 1680. B. fol. 607. But it seems to be now settled that tenant in tail of a trust estate, with remainders over, cannot by will or settlement bar the remainders, or without a recovery any more than tenant in tail of a legal estate, *Kirkham* v. *Smith*, Amb. 518. [*Ireson* v. *Pearman*, 3 B. & C. 799.] Though a different opinion seems to have formerly prevailed, *Baker* v. *Bayley*, post 2 vol. 226. *Beverley* v. *Beverley*, ibid. 131. *Legate* v. *Sewell*, ibid. 551. and 1 P. Wms. 87. so a *Feoffment*, in which trustees and *cestui que trusts* should join would do, *Bowater* v. *Elly*, post 2 vol. 344. So a devise, *Woolnough* v. *Woolnough*, Pre. Ch. 228. et vide *Otway* v. *Hudson et al.* post 2 vol. 583. *Hopkins* v. *Hopkins*, 1 Atk. 591. *Radford* v. *Wilson*, 3 Atk. 815. But a recovery suffered of an equitable estate can affect only equitable remainders, nor can an equitable estate, in suffering a recovery, be blended with a legal estate, vide *Salvin* et *Ux.* against *Thornton*, Amb. 545. 699. and cited *Boteler* v. *Allington*, 1 Bro. Ch. Rep. 72. in note. *Brydges* v. *Brydges*, 3 Ves. 125. But if equitable tenant for life has also the legal estate for life, that is no objection to the recovery, same case, vide also *Cruise* on fines and recoveries, 1 vol. 208, 2 vol. 271. And for other important rules as to recoveries suffered of equitable estates, vide *Shapland* v. *Smith*, 1 Bro. Ch. Rep. 75. *Goodrick* v. *Brown*, 1 Ch. Ca. 49. 2 Freeman, 180. where *Wyndham*, J. doubted if fine or recovery would bar intail of trust estate, unless it was upon a consideration, et vide *Robinson* v. *Comyns*, Forr. 164. *Burnaby* v. *Griffin*, 3 Ves. 277. *Fletcher* v. *Tollett*, 5 Ves. 12.

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[15] Case 9.

July 6, *vel* 11, 1681.

Eq. Ca. Ab. 17. pl. 3. 2 Ch. Rep. 252. S. C.

ROBERT BENSON, Son and Heir of Robert his Father, and his two Sisters, all Infants, by *Prochein Ami*, ... } Plaintiffs;

Sir HENRY BELLASIS and his Wife, Mother of the Plaintiffs and Administratrix of their Father, ... } Defendants.

Settlement made in bar of all the wife's demands out of the personal estate of her husband by the custom of the province of *York* or otherwise.—The husband dies intestate. Wife barred of her distributive, as well as customary part.

ROBERT BENSON, in consideration of marriage with the defendant, the Lady *Bellasis*, before the marriage settled a

jointure on her, in full recompence of dower and of all demands she might make to his personal estate by the custom of the province of *York* or otherwise, under this proviso and limitation, that if she after his death did claim or recover any part of his personal estate by the custom or any other means whatsoever, then the trustees were to be seised of the jointure lands and the use thereof for sixty years, in trust to receive the profits to the use of such persons as should be damnified by her having or claiming dower, or her thirds, or any part of his personal estate, till the persons so damnified should be reimbursed such damnification.

Robert Benson died intestate, and the lady his widow took administration; and the plaintiffs, the children of the said *Robert Benson*, brought their bill for an account of the whole personal estate of their father.

The defendant, the administratrix, by answer said, she was not acquainted before her marriage what agreement her father and Mr. *Benson* made, and that, though she sealed the deed, yet she did not read it nor hear it read, before she sealed it: and that she was advised the intention was, that Mr. *Benson* might have his real and personal estate free to dispose of it, if he thought fit; and he not having disposed of his personal estate, but dying intestate, she had taken administration both in the *Prerogative* and at *York*; and was therefore entitled to her distributive share of her husband's personal estate: and insisted that her jointure, which her husband affirmed was 500*l.* per annum, being but 400*l.*, she ought to have that made good out of his other lands; but there was not any covenant that the jointure was 500*l.* per annum. [16]

For the defendant it was insisted, that her title as administratrix was not expressed in the agreement, though her customary part was, and that was *casus omissus* in the agreement; and so she ought to have that.

But the *Lord Chancellor* declared, that the intent was plain to exclude her wholly of the personal estate; and she could not be entitled to a distributive part of his personal estate without his dying intestate;(1) and it is plain it was

(1) Vide *Blandy* v. *Whitmore*, post 2 vol. 709. and 1 P. Wms, 323, and Mr. Cox's note. *Davila* v. *Davila*, post 2 vol. 724. But it seems to go on the intent as to the distributive part, for where covenant that if wife survived she should be paid 600*l.* out of personal estate, it was held only to bar her of customary part, *Whithill* v. *Phelps*, Pre. Ch. 325. But it is not necessary

BENSON v. BELLASIS.

in his prospect to bar her of what she could claim by the custom or any other means whatsoever: and declared, the taking administration was in violation of the agreement; and if she takes as administratrix, what she so takes must be made good out of the jointure to the children: and decreed an account of the whole personal estate to be taken by a master, (1) and the same to be put out for the plaintiffs' benefit; and the plaintiffs not opposing it, it was ordered that 100*l.* per annum should be added to their mother's jointure.

The defendants, 10th *July*, (83 or 84) obtained a rehearing of this cause by the Lord Keeper *Guildford;* who, upon the rehearing of it, declared that the allowance of 100*l.* per annum a-piece maintenance made(2) the defendants for the plaintiffs by the Lord *Nottingham* (for so much was allowed them by this decree) was too much; but in regard for the time to come the charge of their maintenance would be greater, ordered they should be maintained at that rate till their ages of fourteen; but did not think there should be any

[17] additions to the jointure. But the defendant, the Lady *Bellasis*, must take it according the settlement; and conceived her right to the personal estate was not taken away or lessened by the settlement; and therefore decreed one third of the personal estate to the defendants, to be enjoyed by them free of all claims.(3)

October the 31st, (85) the plaintiffs obtained a rehearing of this cause by the Lord Chancellor *Jefferies*, as to the third of the personal estate decreed to the defendants; and he discharged the Lord *Guildford's* decree, and confirmed the Lord *Nottingham's* decree as to the personal estate; but decreed 150*l.* per annum to be allowed yearly for each child's maintenance.(4)

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in case of personal estate to mention, that it is in bar of customary part, *Lewin* v. *Lewin*, 3 P. Wms. 15. But in the case of a jointure of land it must be expressed to be in bar of customary part, for to say in bar of dower will not, in such case, bar the customary part, *Babington* v. *Greenwood*, 1 P. Wms. 530.

(1) "And of the rents, issues, and "profits of the real estate, other than "the jointure lands; the master to "make to the defendants liberal allow-"ances for maintenance and education "of plaintiffs, and to take account of "real and personal estates yearly, and "the rents and profits to be laid out "and secured for the benefit of the "plaintiffs," Reg. Lib. A. 1680. fol. 655.

(2) Out of the personal estate, R. L.

(3) Upon the offer of *Bellasis*, who appeared in court to take one third of the personal estate and to leave the remainder for the children, it was so decreed, Reg. Lib. A. 1683, fol. 859.

(4) Reg. Lib. A. 1685, fol. 123.

BENSON v. BELLASIS.

And *February* 23, (86) the Lord Chancellor *Jefferies*, upon an original bill brought by the defendants against the now plaintiffs, decreed the plaintiffs, then defendants in that cause, to make the lady's jointure up 500*l.* per annum, and this, on the evidence of her father and uncle, that *Benson*, when he proposed the treaty of marriage, offered to settle 500*l.* per annum jointure ;(1) and that he did after the marriage take notice, the jointure was not of that value, and talked of making it up so much.(2)

But note, there was no covenant or agreement proved, whereby he bound himself to make a jointure of that value; and the portion was but 3,300*l.* to be paid on contingencies, and not so good as 2,000*l.* in hand; but Mr. *Benson* was trusted to draw the settlement.

The Lord *Guildford's* decree seems to be inconsistent with itself, for he conceived the defendant's right to the personal estate was not taken away or lessened, &c. and yet decreed them but one third of it; whereas if her right was not lessened, she had a right to a customary part, as well as a distributive part.(3)

(1) Sed vide *Bellasis* v. *Benson*, post 369, et vide *Peyton* and *Ux.* v. *Bladwell*, post 241. *Carpenter* v. *Carpenter*, post 440.

(2) Reg Lib. A. 1686, fol. 347.

(3) Vide short report of this case, post vol. 2. 263. Where objected by *Hutchins*, Lord Commissioner, that the act of parliament was not passed till 1670, whereas the agreement by which the wife was said to be excluded from the right accruing to her by that act was made in 1669, the year before.

[18]

PITT *versus* HUNT.

Case 10.

Eq. Ca. Ab. 58. pl. 3. 2 Ch. Ca. 73. S. C.

A term assigned in trust for the feme before marriage without the knowledge of the husband may be disposed of by the husband.

THE question was, whether a term assigned in trust for the feme before marriage without the knowledge of her intended husband could be disposed of by the husband.(1)

(1) Where settlement made on children of a former marriage, by widow, previous to second marriage, and without knowledge of second husband, decreed, *Hunt* v. *Matthews*, post 408, and cases cited in not. there, vid. *Carleton* v. Lord *Dorset*, post vol. 2. p. 17. The general rule certainly laid down is, that if a woman previously to marriage conveys her property without the knowledge of her intended husband, it is a fraud on the marital rights. Countess of *Strathmore* v. *Bowes*, 1 Ves. Jun. 28, *Ball* v. *Montgomery*, 2 Ves. Jun. 194. But held not to be such a fraud where debt contracted for valuable considera-

PITT v. HUNT.

It was insisted by the counsel for the woman, that it could not be disposed of by the husband, and cited many resolutions in this Court to that purpose, as *Edmonds* and *Barrington's* case, Sir *John Daccomb's* case, and *Sandys's* case: but on the other side it was answered, that true it is, there have been such resolutions; but that now the law is changed by the resolution of the Lords in Chief Baron *Turner's* case, which is exactly the same case with this, and it was there by all the Lords in Parliament resolved, that the husband might dispose of the trust of the term.

Ante, Case 5.

The *Lord Chancellor* seemed to wonder at that resolution, and said it could not amount to an Act of Parliament to change the law; and although at first there possibly was no great reason for those resolutions, that the husband could not dispose of a trust for the feme made without his privity before marriage; yet the law being so settled, people made provisions for their children according to what the law was then taken to be; and now those provisions are defeated by this new resolution; so that now it is almost impossible for a man so to provide for his child but it shall be subject to the disposal of an extravagant husband: and he commended the saying of Chief Baron *Walter*, *viz.* It is no matter what the law is, so it be known what it is. But at last he said he must be concluded by the Lords' judgment, and so he decreed it according to Chief Baron *Turner's* case, saying that there must not be one sort of equity above stairs in the House of *Lords*, and another below stairs in *Chancery*. And he thought that from henceforth it would not serve turn to have the husband's consent or privity to an assignment of a term in trust for the feme before marriage, unless he was likewise made a party to the assignment.(1)

[19]

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tion, though concealed from the husband, *Blanchet* v. *Foster*, 2 Vez. 264. And see the case of *Lady Strathmore* v. *Bowes*, 2 Bro. Ch. Rep. 345. 1 Ves. Jun. 22., where, under the circumstances of the case, a conveyance of feme's estate, and an assignment of personal estate to trustees before the marriage and without the knowledge of the husband, held good. Where by Mr. Justice *Buller* "no case has yet established the rule that all conveyances "by a wife, before marriage, are void, "merely because not communicated to "the husband."

(1) So it is held that husband may surrender or dispose of a term vested in the wife, as executrix or administratrix, *Levick* v. *Coppin*, 2 Bl. Rep. 801. 3 Wils. 277, et vide Sir *Edward Turner's* case, ante, p. 7., and cases cited in note there.

ARUNDEL *versus* ROLL *et Ux.*

Case 11.

In a bill to have an account of moneys received by the defendant for the plaintiff's use, the defendant insisted to have an allowance for the plaintiff's diet at the rate of 5*l.* per week, alleging that she was a person of quality and fortune, and being courted by divers noble persons much was spent in entertainments: but it appearing by letters read in court that the plaintiff came to the defendant's house at her invitation, and as a guest only, the defendant being her aunt; it was said by the *Lord Chancellor* that it was no honourable demand, and decreed she should account without having any allowance for diet deducted.(1)

Eq. Ca. Ab. 8. pl. 3. In an account no allowance for diet, where the plaintiff came as a guest at the defendant's invitation.

(1) But defendants to be at liberty to bring an action at law for the same, if they should think fit. Reg. Lib. 1681, A. fol. 123.

JARVIS and *Ux. versus* DUKE.

Case 12.

Sir *E. Duke* by his will devised a legacy of 2,000*l.* to one of his daughters; but if she should marry one *Bacon*, that then the legacy should be void. She having before her father's death married the said *Bacon*, takes advice upon the will, and is advised that the legacy was void by reason of her having married *Bacon*. Her brother pays her 800*l.* and she releases her legacy.

Eq. Ca. Ab. 110. pl. 1.

The bill was to have this release set aside,(1) and her legacy made good to her, pretending she was circumvented in this release, her brother telling her she had no legacy given her by her father's will, but was rased out of it, and that he suppressed the will, and did not prove it till after such time as he had obtained this release.

To which it was said by my *Lord Chancellor*, that it is the constant rule, where there is either *suppressio veri* or *suggestio falsi* the release shall be avoided. (2)

A release shall be avoided, where there is *suppressio veri* or *suggestio falsi*.

(1) There were two releases executed by plaintiff, but for what purpose does not appear, R. L.

(2) So *Broderick* v. *Broderick*, 1 P. Wms. 239, and cases there cited in note. And for the several grounds on which courts of equity exercise jurisdiction, in setting aside deeds, &c. vide

JERVOIS v. DUKE.

An executor may be admitted to prove the revocation of any legacy, though he has proved the will.

Then they went on to prove that Sir *E. Duke* in his lifetime did actually revoke this will, and declared his daughter should have no such legacy.

*To which it was objected, that they could not be admitted to that proof, by reason that the defendant himself had proved the will, which he could not do without taking an oath, that it was his father's last will. *Sed non allocatur*, for that he only swears, that he believes it to be his father's last will, and at that time he might not know of the revocation.

[*20]

A legacy given to a feme on condition not to marry without the consent of *J. S.* is only *in terrorem*, if not devised over.

And it being fully proved, that the father had revoked this legacy, it was decreed by the *Lord Chancellor* against the plaintiff, saying, that where a legacy is devised to a woman, upon condition she marry with the consent of *J. S.* here if the legacy be not limited over, it is only *in terrorem*, and though she marry without consent, it doth not avoid the legacy. (1) But here in this case the father himself having

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Osmond v. *Fitzroy*, 3 P. Wms. 129, and cases there cited in note; vide also *Naldred* v. *Gilham*, 1 P. Wms. 578. As to the diversity in the exercise of the jurisdiction of courts of equity in setting aside deeds and wills, vide *Goss* v. *Tracy*, 1 P. Wms. 287, and cases there cited in note. If a release is given on a particular consideration recited, notwithstanding that the release concludes with general words, yet the law, in order to prevent surprise, will construe it to relate to the particular matter recited, said by Lord Chancellor, *Cole* v. *Gibson*, 1 Vez. 507. So *Ramsden* v. *Hylton*, 2 Vez. 310. note, the case of *Evans* v. *Llewellyn*, 2 Bro. Ch. Rep. 150, cited by Mr. *Cox*, in *Broderick* v. *Broderick*, was a case of improvidence, and not of direct fraud or imposition. As to the effect of misapprehension in the party avoiding his release, vide *Gee* v. *Spencer*, post 32, but the release, in this case, appears to have been fairly obtained, R. L.

(1) [*Marples* v. *Bainbridge*, 1 Madd. 590. and cases there cited.] And it seems to have been formerly the doctrine on this head, that a gift over of the residue was not sufficient to avoid the legacy, *Garret* et *Ux* v. *Pritty* et *Al.* post 2 vol. *Wheeler* v. *Bingham*, 1 Wils. 135., where the reason fully given by Lord *Hardwicke*, who states it to be a settled doctrine. Nor the overplus of what is called the residue, after certain legacies given thereout, *Semphill* et *Ux.* v. *Bayley* et *Ux.* Pre. Ch. 565, but it has since been decided, though much argument on that point from the bench does not appear, that such a legacy shall be avoided under a gift of the general residue, *Scott* v. *Tyler*, 2 Bro. Ch. Rep. 431, which see for a summary of the leading cases on this subject, but a limitation over to the executor will not do, for it is no more than the law implies, *Cage* v. *Russell*, 2 Vent. 352, Eq. Ca. Ab. 108. pl. 3. The court inclines to favour consents and will construe them with great latitude, vide *Duley* v. *Desbouverie*, 2 Atk. 264, and cases cited in note there. [*Clarke* v. *Parker*, 19 Ves. 1. *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225. *Lloyd* v. *Branton*, 3 Mer. 108.] And will not extend such a condition, (if not so expressed) to the case of a second marriage, without consent, by a daughter who had married with consent in the testator's life time after the date of the will, and become a widow, *Crommelin*

actually revoked the legacy upon his daughter's disobedience, the father himself has in this case been Chancellor, and that with equity too: such an example of presumptuous disobedience highly meriting such a punishment; she being only prohibited to marry with one man by name, and nothing in the whole fair garden of *Eden* would serve her turn but this *forbidden fruit*. (1)

JERVOIS v. DUKE.

v. *Crommelin*, 3 Ves. 227, at least it is presumed this is the principle of that case. Nor where married by consent of the father after date of the will, *Clarke* v. *Berkley*, post 2 vol. 720.

[See also *Hutcheson* v. *Hammond*, 3 Bro. Cha. Rep. 146. *Parnell* v. *Lyon*, 1 V. & B. 479. *Wheeler* v. *Warner*, 1 S. & S. 304.]

(1) Reg. Lib. 1681, A. fol. 351.

NEWLAND *versus* HORSEMAN.

[21]

Case 13.

2 Ch. Ca. 74. S. C.

A peremptory sentence in a court of Admiralty beyond sea will conclude the parties here.

SIR *Benjamin Newland* being sued upon his charter-party for freight, exhibits his bill to stay proceedings at law; and the cause coming this day to be heard, the case appeared to be, that the ship being unladen at *Barcelona*, where the freight was made payable by the charter-party, the factor refusing to pay the freight, the master of the ship litigated there in the Admiralty for it; and the cause was heard, and judgment there given, that the master should have his freight, but that the damages the goods had sustained in the voyage by reason of the deviation should be deducted, and the account transferred to the *Deliquidators*, who are in the nature of our *Masters in Chancery*, to take the account, and the money ordered to be brought into court; but the factor had appealed to a higher Court there.

Lord Chancellor declared, that he would not slight their proceedings beyond sea; and if in this case the damages had been there ascertained, or a peremptory sentence given, the same should have been concluding to all parties: but it appearing the factor was a native of that place, and therefore in all probability might against justice prevail, and *Horseman* being willing to desist his suit there, his Lordship directed a trial here by jury, to ascertain the damages sustained by the deviation. (1)

(1) The Court declared that it did not appear that the damages had been judicially ascertained at Barcelona, and therefore that the demands on both

sides are most properly determinable at the common law, Reg. Lib. 1681, B. fol. 58. So according to the opinion of Lord *Mansfield* in the case of *Bernardi* v. *Motteux*, Doug. Rep. 581, the judgments of foreign Courts of Admiralty, as to matters within their jurisdiction, cannot be controverted collaterally in a civil suit, but must be reversed by the regular Court of Appeal. The decision, in that case, went upon the ground of the ambiguity of the sentence of the foreign Court of Admiralty, but as to the judgments of Foreign Courts in Civil Suits it seems to be now decided that they are only to be taken as *primâ facie* evidence of the debt, and that it is competent to the defendant to impeach the justice of the judgment, vid. *Walker* v. *Witter*, Doug. Rep. 1. and Cases there cited in note, wherein this subject is very fully discussed, sed nota, the reference there to Ca. Temp. Hardwicke 87, 89, is not correct, the case meant must be *Gage* v. *Bulkeley*, Ca. Temp. Hard. 263. 3 Atk. 214. vide also *Wright* and *Simpson*, 6 Ves. 730. The sentence of condemnation in a neutral port, by a consul belonging to a hostile nation, is not recognized by Courts of Admiralty here, *Havelock* v. *Rockwood*, 8 Term Rep. 268. *Case of ship Flad Oyen*, Rob. Adm. Rep. vol. 1. p. 135, cited in *Havelock* v. *Rockwood*. But it should seem that debt does not lie in Ireland on a judgment in B. R. in England, *Otway* v. *Ramsey*, 2 Str. 1090. This was in error on judgment in Ireland, and the plaintiff in error after two arguments declining a third, the judgment in Ireland was affirmed, Eas. Term, 11 Geo. 2d. Lib. K. 202, Lib. L. 57. So an administration granted in a foreign Court, (as at Paris) cannot be taken notice of in the Courts here, *Tourton* v. *Flower*, 3 P. Wms. 370. So the proceedings in the ecclesiastical courts in this kingdom are not records, but only evidence of sentences in those Courts, dict. per *Hardwicke*, Lord Chancellor, *Colegrave* v. *Jewson*, 3 Atk. 197. And a plea of a foreign sentence in a Commissary Court in France relating to the same matters for which the Bill was brought here, over-ruled by *Hardwicke*, Lord Chancellor, *Gage* v. *Bulkeley*, ub. sup. and the validity of a sentence of the Admiralty in *Scotland*, is determinable by the law of the Admiralty here, and not by the common law, *Radley* et *Al.* v. *Egglesfield* et *Al.*, 2 Saund. Rep. 259. But an agreement made in Paris on the marriage of two French persons, touching the fortune of the wife, specific execution decreed here, *Feaubert* v. *Turst*, Pre. Ch. 207. 1 Br. Parl. Ca. 38. et vide *Roach* v. *Garvan*, 1 Vez. 159. And Courts of Equity here will take notice of the proceedings of a Foreign Court of competent jurisdiction, in cases of lunacy, *Ex parte Otto Lewis*, 1 Vez. 298. *Ex parte Gillam*, 2 Ves. Jun. 587, et vide *Ex parte* Marchioness of *Annandale*, Amb. 80. Vide also in confirmation of this doctrine, *Beake* v. *Tyrrell*, Carth. 31. Select Ca. in Ch. in Lord *King's* time. Ed. 1740, 69, 70. *Hughes* v. *Cornelius*, Skinner 59. 2 Show. 232. Raym. 473. *Green* v. *Waller*, ibid. 893. Note in *Dupleix* v. *De Roven*, post 2 vol. 540. A judgment in a foreign Court considered here as a simple contract debt only, and that the statute of limitations would run upon it. As to the effect of the statute of limitations in the case of plaintiff and defendant, being beyond sea, vide Stat. 21 Jac. 1. cap. 16. sect. 7. 4 Anne, cap. 16. sect. 19. *Jolliffe* v. *Pitt*, post 2 vol. 694.

Case 14.

FAWLKNER *versus* FAWLKNER.

Eq. Ca. Ab. 119. pl. 6. S. C.

The lord of a manor, where by the custom he has the cut of the woods growing on the lands, grants all the woods and underwoods on the copyhold lands to the copyholder in fee. This shall not merge in the copyhold.

THE case was, that a copyholder of lands in fee, where by the custom of the manor the lord had as a profit *à prendre* the cut of the woods and underwoods growing on the copyhold, obtains a grant from the lord of all the woods and underwoods growing, and *which afterwards should grow on the said copyhold lands, to him and his heirs; the question was, whether this should not merge in the copyhold, being, as was alleged, only a profit *à prendre*. 1st. If a copyholder pays a rent to the lord, and the lord grants or releases this rent to his tenant, this shall merge in the copyhold. *Sed non allocatur.* (1)

[*22]

Devise of lands to the heirs at law for 20 years after the death of the wife. This is an estate for life in the wife by implication; otherwise, if the devise is to a stranger.

2*dly*. In this case the copyholder devises to *J. S.* these underwoods for twenty years after the death of his wife, to raise portions for his younger children. And the question is, whether the feme had not by implication an estate for life.

The *Lord Chancellor* said, that where such a devise is made to the heir, there indeed an estate shall arise to the wife by implication; but where it is devised to a stranger, as in this case, there in the mean time it shall descend to the heir. (2)

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(1) But where tenant in tail of copyhold takes a conveyance of the freehold in his own name, it is presumed the copyhold is merged, *Parker* v. *Tarner*, post 458.

(2) Reg. Lib. 1681, A. fol. 335. So 13 Hen. 7. pl. 17. *Welcden* v. *Elkington*, Plow. 521. 1 Rol. 843. pl. 2. *Horton* v. *Horton*, Cro. Jac. 75. *Gardner* v. *Sheldon*, Vaugh. 263, 4. Bro. Abr. tit. Devise 52. City of *London* v. *Garway*, post 2 vol. 571. *Holmes* v. *Meynell*, Sir T. Raym. 453. *Smartle* v. *Scholler*, Jo. 98. 3 Keb. 816. *Ackroyd* v. *Smithson*, 1 Bro. Ch. Rep. 503. *Pickering* v. Lord *Stamford*, 3 Ves. 492. These cases all go upon the principle that the heir at law shall not be disinherited but by express words or necessary implication, and which is the established principle of the court, *Boutell* v. *Mohun*, Pre. Ch. 384. *Sympson* v. *Hornsby*, ibid. 440. [*Aspinall* v. *Pettvin*, 1 S. & S. 544. See also *Nash* v. *Smith*, 17 Ves. 29. *Tregonwell* v. *Sydenham*, 3 Dow, 210. *Kellett* v. *Kellett*, 1 Ba. & Be. 533. 3 Dow, 248. *King* v. *Denison*, 1 V. & B. 260.] And this principle holds good as well where he is heir of customary lands as of freehold, *Gascoigne* v. *Barker*, 3 Atk. Rep. 9. *Byas* v. *Byas*, 2 Vez. 165. And the doctrine contained in the above cases is recognized *Upton* v. Lord *Ferrars*, 5 Ves. 801. And the next of kin as to the personal estate stand in parity of reason, with the heir at law, as to the real, *Pickering* v. *Stamford*, 3 Ves. 493. But a contrary notion seems to have prevailed formerly, vide *Rayman* v. *Gould*, Moor 635, where said, "There cannot be an estate for life by implication in a term, as there may be in an inheritance." But though the heir at law does not want an express intention in the case

of a will, it is otherwise in the case of a deed, for there, since the statute of frauds and perjuries, the heir must shew an express trust for him, in order to entitle himself, *Lloyd* v. *Spillet*, 2 Atk. 151. And where there is no ambiguity the plea of heirship must not controul a plain and express will, per *Holt*, Ch. J. Lord *Falkland* v. *Bertie*, post 2 vol. 340. As to what shall be considered a necessary implication to disinherit the heir, vide *Boutell* v. *Mohun*, ub. sup.

Case 15.

HOW *versus* Tenants of BROMSGROVE.

Eq. Ca. Ab. 79. pl. 1. S. C.

Bills of peace to prevent multiplicity of suits are proper in equity.

THERE having been two issues directed, the one, whether *How* the lord of the manor of *Bromsgrove* had a grant of *free warren;* and the other, in case he had a grant of *free warren*, whether there were sufficient common left for the tenants. Upon motion for a new trial, the *Lord Chancellor* said, these matters were properly triable at common law; and he did not see, what jurisdiction the chancery had of this cause: but it was urged, the bill was brought to prevent multiplicity of suits, and was in its nature a bill of peace: and a new trial was granted, upon payment of full costs. (1)

(1) *Reasonable* costs. Reg. Lib. 1681, A. fol. 358. And though it is a general rule that a man shall not come into a court of equity to establish a legal right, unless he has tried his title at law if he can, yet this objection will not always prevail, for there have been a variety of cases both ways, vide *Ewelme Hospital* v. *Andover*, post 266, and cases there cited, Mayor of *York* v. *Pilkington*, 1 Atk. 282, and cases there cited, *Fitton* v. Earl of *Macclesfield*, post 293.

[23]

Case 16.

WILKINSON *versus* WILKINSON.

Eq. Ca. Ab. 413. pl. 14.

A man makes his brother executor, and gives him all his real and personal estate, and afterwards marrying, by a codicil makes his wife executrix. She shall have the personal estate, and not the brother.

JOHN WILKINSON one of the six clerks made his will, and thereof made his brother executor, and devised unto his executor all his estate both real and personal: (1) and four

(1) Where the devise was, "I make my niece *G.* executrix of all my goods, lands, and chattels," and dies, not having any leasehold inheritance, here the lands of inheritance pass not by those words, *Piggot* v. *Penrice*, Pre. Chan. 471. Com. Rep. 250, S. C.

years afterwards he marries, and then by a codicil makes his wife his executrix. The question was, whether the brother should have the personal estate as legatee. It was urged, that he should; for he does not take it as executor only, but by express words of gift in the will; and it appears, that there was not only a benefit intended him as executor, for even the real estate was devised unto him: but it being in proof, that he had not any the least real estate in the world, it was said by the *Lord Chancellor*, that the personal estate was intended him only as executor; (1) and it was thereupon decreed for the widow the executrix. (2)

WILKINSON v. WILKINSON.

(1) But where testator gives and devises to *A.* whom he makes sole executrix, there, no doubt, but such executrix will take beneficially, vide *Ridout* v. *Paine*, 3 Atk. 486, where the only question was what estate executrix should take.

(2) There is merely an order of dismissal. Reg. Lib. 1681, B. fol. 67.

TRACY *versus* TRACY.

Case 17.

Eq.Ca.Ab.399. pl. 1, 2.

A. tenant for life, remainder to *B.* for life, remainder over. *A.* though dispunishable of waste at law, by reason of the mesne remainder for life, yet shall be enjoined from committing waste in a court of equity.

IN a bill for discovery of the defendant's estate, and to have the writings brought into court, and to prohibit waste in plowing, &c. The defendant, by way of plea, set forth, that in part of the land she had an estate for life, as a jointress, without impeachment of waste.

It was resolved by the *Lord Chancellor*, that although she was tenant for life, remainder for life, remainder in tail, so that she was dispunishable of waste at common law by reason of the mesne remainder for life, yet in such case this court does always grant an injunction to stay waste: (1) but if her jointure deed were made with an express clause of *without impeachment of waste*, as in truth the case was, then there could be no prohibition as to those lands. (2)

But tenant for life without impeachment of waste shall not be enjoined from committing waste.

(1) *Anon.* Moor, 554. 1 Rol. Abr. 377. [*Farrant* v. *Lovel*, 3 Atk. 723. And an injunction will be granted at the suit of a mesne remainder-man for life, *Mollineux* v. *Powell*, 3 P. W. 268, n. F., without making the owners of the inheritance a party, *Dayrell* v. *Champness*, 1 Eq. Abr. 400, (cited in *Garth* v. *Cotton*, 1 Dick. 197.) *Davies* v. *Leo*, 6 Ves. 787.] As to the effect of the words, "without impeachment of waste" at law, vide *Browning* v. *Beston*, Plow. 135.

(2) But this court will not permit tenant for life with express clause *without impeachment of waste*, to do acts

that may destroy the inheritance. Case 5 Jac. 1, mentioned in *Aston* v. *Aston*, 1 Vez. 264. *Abrahal* v. *Bubb*, 2 Show. Rep. 69. More fully reported 2 Free. 53. Not decided, but *Lord Chancellor* discovered his inclination *fortiter* for granting injunction, ibid. [S. C. from Lord *Nottingham's* MS., 2 Swan 172.n.] Nor tenant after possibility of issue extinct, *Williams* v *Day*, 2 Ch. Ca. 32. *Abrahal* v. *Bubb*, ub. sup. *Anon.* 2 Free. 278. et vide *Bishop of London* v. *Web*, 1 P. Wms. 527. *Aston* v. *Aston*, ub. sup. *Packington's* Case, 3 Atk. 215. Nor to cut ornamental trees nor saplings, *Packington's* Case, ub sup. *Obrien* v. *Obrien*, Amb. 107. *Strathmore* v. *Bowes*, 2 Bro. Ch. Rep. 89. *Chamberlain* v. *Dummer*, 1 Bro. Ch. Rep. 166. [3 Bro. Ch. Rep. 549.] and cases there cited. The case, however, there was of tenant for life, who could not cut timber, but with special permission for her own use and benefit at seasonable times in the year. Where tenant for life, remainder for life, remainder in tail, and first tenant for life cut down timber trees, it seems the remainder-man in tail may seize the trees, though during the intermediate remainder he could not bring his action, *Udal* v. *Udal*, Aleyn. Rep. 81. Note, where an application to the court on the ground of waste, for injunction against converting ancient meadow land into tillage, an affidavit that the land is ancient meadow seems necessary—contra, it appears, where there is an express covenant not to convert any meadow land, Lord *Grey de Wilton* v. *Saxon*, 6 Ves. 106. [See further on the subject of restraining tenants for life, &c., unimpeachable for waste, from committing equitable waste, *Downshire* v. *Sandys*, 6 Ves. 107. *Tamworth* v. *Ferrers*, 6 Ves. 419. *Williams* v. *M'Namara*, 8 Ves. 70. *Burges* v. *Lamb*, 16 Ves. 375. *Smythe* v. *Smythe*, 2 Swan. 251. *Attorney-General* v. *Marlborough*, 3 Madd. 498. *Coffin* v. *Coffin*, Jacob, 70.]

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[24]

HEYWARD *versus* LOMAX.

Case 18.

Eq. Ca. Ab. 147. pl. 1.

A. indebted on security carrying interest, and on simple contract, pays money generally. It shall be taken to be paid towards discharge of the debt which carried interest.

Vid. post Perris v. *Roberts, Case* 33.

WHERE a man owes money on a mortgage, and other moneys to the same person on account, for which he is not to pay any interest, and he makes a general payment, without mentioning it to be in discharge of the mortgage, or of the moneys due upon the account; it shall be taken to have been paid towards discharge of the money due on the mortgage; because it is natural to suppose, that a man would rather elect to pay off the money, for which interest was to be paid, than the money due on account, for which no interest is payable. (1)

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(1) The rule of law, *quicquid solvitur, solvitur secundum modum solventis*, seems to have been uniformly received in our courts, it was fully acknowledged in *Anon.* Cro. Eliz. 68. pl. 19. *Pinnel's* Case, 5 Rep. 117. *Prowse* v. *Worthing*, 2 Brownlow, 107. *Chase* and *Box*, M. 1702. 2 Freem. 261. *Bois* v. *Cranfield*, Style, 239. *Young* v. *Rudd*, 5 Mod. 86. The question has arisen on indefinite payment. In *Prowse* v. *Worthing*, ub. sup. the rule acknowledged. *Anon.* 8 Mod. 236, seems contra; and where payment made

in pursuance of a preceding account in which two debts of different natures are blended and no direction, the payment shall be intended according to the account, *viz.* on both debts, and so shall be proportioned rateably on both debts, *Perris* v. *Roberts*, post 34. 2 Ch. Ca. 84, decreed on a rehearing. In *Brett* v. *Marsh*, post 468, the defendant had, as the court conceived, marked out how the payment was to be applied. In *Manning* v. *Westerne*, post 2 vol. p. 606, per *Lord Chancellor*, the rule *quicquid solvitur*, &c. is to be understood when at the time of payment he that pays the money declares upon what account he pays it, but if the payment is general the application is in the party who receives the money, and so held in *Wilkinson* v. *Sterne*, 9 Mod. 427, Leach edit. and held there that party paying must direct the application at the very time he pays. An entry made by the debtor in his own books was held not sufficient to determine the application of the payment, *Manning* v. *Westerne*, ub. sup. Yet in *Anon.* Comb. 463. 9 W. 3., where *A.* whilst a trader, owed *B.* 100*l.* and left off trade and then borrowed of *B.* 100*l.* more, then *A.* pays *B.* 100*l.* not mentioning which, per *Holt*, Ch. Jus., it shall be applied to the former, so that the creditors shall never charge him with commission of bankruptcy for that 100*l.* which remains. In the case of *Colt* v. *Netterville*, 2 P. Wms. 307, it was said, it is not material how, or in what manner the defendant received or accepted it, but how the other paid it. And where general payment by guardian of bond debts out of real estate, as appears by answer, and no other evidence, payment will be presumed to have been made out of the fund that ought, in justice, to have borne it, *Chaplin* v. *Chaplin*, 3 P. Wms. 365. And note, the principle in pleading appears to be, that where a thing given, or payment made, and the plea is that such thing was given, or payment was made in satisfaction, it is in both cases traversable. *Young* v. *Rudd*, 5 Mod. 86. [See further on the rule *quicquid solvitur*, &c., *Clayton's* Case, first exception, in *Devaynes* v. *Noble*, 1 Mer. 585. *Bodenham* v. *Purchas*, 2 B. & A. 45. *Simson* v. *Ingham*, 2 B. & C. 65. *Wright* v. *Laing*, 3 B. & C. 165. *Shaw* v. *Picton*, 4 B. & C. 728. *Williams* v. *Rawlinson*, 3 Bing. 71.]

DOM' REX *versus* SNELLER, RUSSELL, *et al'*. Case 19.

Supersedeas to a writ *de excom. capiend'* denied, though the *significavit* was general and uncertain, and said that the method was to proceed by *habeas corpus*. But an appeal being brought a *supersedeas* was granted.

THE defendants being excommunicated for a contumacy, and a writ of *de excommunicat' capiend'* awarded, it was moved for a *supersedeas* to the writ, by reason that the *significavit* was general and uncertain. But it was said by the *Lord Chancellor* that a *supersedeas* could not be granted upon that ground; but if the excommunication were not for any of the offences within the statute of 5 *Eliz.* and the *significavit* did not express the same, the remedy expressly appointed upon that statute is a *habeas corpus*, and upon the return of it, the parties shall be discharged: but it being then alleged, that an appeal was brought, and security given to prosecute it with effect, a *supersedeas* was awarded, the

REX v. SNELLER. *Lord Chancellor* saying that the appeal was a *supersedeas* of itself. (1)

(1) This court will not grant *supersedeas* of writ *de excom. capiend'* on motion for want of addition, nor because not said that the defendant was commorant in the diocese. *Rex* v. *Burrard*, 1 P. Wms. 435. Nor because executrix being in custody under the writ, disputed the debt upon *equitable* grounds. The *King* v. *Blatch*, 5 Ves. 113, et vide *Trebec* v. *Keith*, 2 Atk. 497. The writ *de excomm' capiend'* never directed to the warden of the fleet, but the words "or other officer," in the statute 5th Eliz. cap. 23, construed to mean bailiffs of liberties, or the coroner, but not the warden of the fleet, the writ being viscountiel, and must be returnable into K. B. vide Capt. *Strudwicke's* Case, 3 P. Wms. 53, and it is returnable in the term next after the teste, vide the statute. So after the return of the writ is out, this court has no authority to quash it, and application must be to K. B. *Ex parte Little*, 3 Atk. 479. But K. B. has no cognizance, and the jurisdiction of this court remains, till the return of the writ. The court so inclined in *Rex* v. *Burrard*, ub. sup. and so adjudged in *Barlow* v. *Collins*, 1 P. Wms. 436, *n.* And every writ of *excom. cap.* must be made out in *term time*, vide the stat. sec. 2. And note, it seems that before the stat. 5 Eliz. the party could not be discharged but by supersedeas in this court, *King* v. *Fowler*, Salk. 293. 1 Raym. 586, 618, and said the recital of the significavit must be certain. The *Queen* v. *Hill*, Salk. 294, et vide the *Queen* v. *Bishop of St. David's*, and the *Queen* v. *Sangway*, ibid. [By stat. 53 G. 3. c. 127, excommunication is not to be pronounced, except as a spiritual censure for offences of ecclesiastical cognizance; but in cases of contempt a writ *de contumace capiendo* is to issue, instead of the writ *de excommunicato capiendo*.]

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Case 20.

COKE *and* HODGES.

Administrator *durante minoritate* obtains a decree to account; the infant marries, and a new administration during her minority is granted to the husband.

A BILL brought by an administrator *durante minoritate*, and an account decreed to be taken. The infant marries, and thereupon the administration during her minority is committed to the husband.

Upon a new bill brought to have the benefit of the former proceedings, the defendant demurred, and the question was, whether this second administrator could carry on the account?

Whether this second administrator can carry on the account.

It was objected, that such an administrator cannot at law take execution on a judgment obtained by a former administrator: but it was ordered that the defendant should answer, and that matter be saved unto him at the hearing of the cause. (1)

(1) Administrator *durante min. ætat.* proceeded to a decree and account before the Master, after which the infant coming of age was allowed to go on,

Jones v. *Basset*, Prec. in Chan. 174. But in any other case but that of a decree and account, it seems as if the party must begin again, ibid. Where an administrator, *durante minore ætate*, brings debt, and then the executor comes of age, such executor cannot bring writ of journies accompts, not being privy, for one comes in by the ordinary, and the other by the testator, *Elstobb* v. *Thoroughgood*, Salk. 393, otherwise where both come in by the ordinary or both by the testator, ibid. As to the general power of administrator *durante minoritate*, vide *Prince's* Case, 5 Rep. 29. *Freke* v. *Thomas*, 1 Raym. 667. And as to the determination of such an administration, vide *Jones* v. *Strafford*, 3 P. Wms. 81. And further vide *Whitmore* v. *Weld*, post 326, Toller's Law of Executors, Book 3. ch. 7. and cases there respectively cited.

. . . . *versus* EMERTON. Case 21.

A. after judgment in ejectment, and a writ of possession taken out against him, brings a bill, and has an injunction on a *dedimus*.

THE defendant had obtained judgment in ejectment against the now plaintiff, and had execution awarded, but the undersheriff refused to execute it; whereupon by rule of court of the *King's Bench* the undersheriff was ordered to attend, and for not attending an attachment was awarded against him. After all this proceeding, the defendant in the ejectment exhibits his bill in this court, and *Emerton* praying a *dedimus* an injunction was granted of course.

This injunction was allowed to extend to the undersheriff, who had refused to execute the writ, and was in contempt to an attachment in the K. B. before the bill filed.

I moved my lord that this injunction might not extend to stay proceedings against the undersheriff for his contempt to the court of *King's Bench*; for that he was prosecuted for the contempt at the king's suit; and it was unnatural for the king by his injunction to stay his own suit in another court, the offence being committed before the bill exhibited: yet the motion was denied by my *Lord Chancellor*. (1)

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(1) But an injunction upon an attachment or a *dedimus*, or upon defendants praying time, does not extend to stay proceedings in the spiritual court, but to stay such proceedings it must be moved specially, *Anon.* 1 P. Wms. 301. [*Reed* v. *Bowyer*, 1 Price, 101.] Query as to the proceedings in the Court of Admiralty, June 1746, *Anon.* 3 Atk. 350. [*M'Namara* v. *Macquire*, 1 Dick. 223.] In what cases this court, and upon what ground a court of law will grant injunction, or otherwise stay proceedings in ecclesiastical court. *Petit* v. *Smith*, 1 P. Wms. 7. *Blackborough* v *Davies*, ibid. 43. *Nicholas* v. *Nicholas*, Pre. in Chan. 548. *Hill* v. *Turner*, 1 Atk. 516. *Rotherham* v. *Fanshaw*, 3 Atk. 629. Where and upon what grounds, not. *Stephenton* v. *Gardiner*, 2 P. Wms. 287. *Basset* v. *Basset*, 3 Atk. 203. *Rotherham* v. *Fanshaw*, 3 Atk. 628. Prohibition to the spiritual court will lie at law in the case of executor, sued there for an account. *Sparrow* v. *Norfolk*, Noy. 28. Contra in the case of an administrator. *Montague* v. *Clark*, ibid. 24. *Took's* case, ibid. *Lanch* v. *Ross*, cited there, but if administrator be sued in the spiritual court for division of goods, prohibition will lie, ibid. et vide 21 Hen. 8. c. 5., et vide *Brown* v. *Brown*, post 158. Where said *arguendo* at the bar that it is not usual to stay proceedings on attachment in another court.

DE

TERMINO S. HILLARII,

33 & 34 *Car.* II. 1681.

IN CURIA CANCELLARIÆ.

Case 22.

Eq. Ca. Ab. 235. pl. 1. S. C.

24 *Feb.* (81.)

HORRELL, Executor of TIPPER, . Plaintiff.
WILLIAM WALDRON, and Three of his Children, Infants . . . . } Defendants.

A personal legacy given to an infant more properly cognizable in chancery than in the ecclesiastical court.

TIPPER gave the three children 200*l.* to be paid within a year after his death; the executor brought his bill, and set forth, that neither of the children was ten years old, and that the testator died about a year since, and that the plaintiff was willing to pay the 200*l.* so as he might do it safely, and be well discharged, and indemnified: and complained that the father sued him in the *consistory* court, to force him to pay the 200*l.* to the father, without giving the plaintiff any security against the children; their father being a butcher: and the plaintiff insisted he could not be well discharged, but by a decree in this court; where care would be taken to secure the money for the children, and for the plaintiff's indemnity and discharge.

The defendant demurred, for that this matter was properly determinable in the *consistory* court, where the matter
[27] depended; it being for a legacy, and that it was properly cognizable there.

But the *Lord Chancellor* declared, the suit was proper here; and that if the matter had proceeded to a sentence in the ecclesiastical court, it was proper to come here for the executor's indemnity, and that here legatees were to give security to refund, but not there: (1) and this court would see the money put out for the children, and so over-ruled the demurrer. (2)

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(1) And where legatees were paid, and afterwards the assets fell short, they were decreed to refund to an unsatisfied creditor. *Anon.* post 162. et vide *Noel* v. *Robinson*, post 93, and cases cited in note there.

(2) But without costs, Reg. Lib. A. 1681. fol. 232. The spiritual court cannot oblige a guardian to pay interest for infant's money in his hands,

though they will compel him to give security, but this court will do both, *Nicholas* v. *Nicholas*, Pre. Chan. 547. [By stat. 36 G. 3. c. 52. s. 33, legacies given to infants may be paid into the Bank of England. See also stat. 37 G. 3. c. 135. *Whopham* v. *Wingfield*, 4 Ves. 630.]

ABERY and JONES, Creditors of POINTZ, . Plaintiffs;
WILLIAMS, ... Defendant.

Case 23.
Feb. 1681.

Equity will not compel a man to discover what goods he really bought of a bankrupt after the bankruptcy and before the commission sued out, where the party has no notice of the bankruptcy.

THE bill set forth, that *Pointz* being indebted to the plaintiffs 900*l.* and to others 3,000*l.* became a bankrupt, and 16 *Novembris* (80) a commission was sued out against him, and he found a bankrupt; and that several suits of tapestry of his were in the defendant's hands, which the commissioners had assigned to the plaintiffs for the benefit of his creditors, and that they ought to have an account thereof; but that the defendant pretended, they were pawned or sold to him by *Pointz* the bankrupt without any trust; whereas it was on a trust, and done to conceal them; and so prayed a discovery and relief.

The defendant pleaded, that neither he, nor any in trust for him, hath nor ever had any goods belonging to *Pointz*, but what the defendant bought *bonâ fide*, for a full value in money really paid by the defendant to *Pointz* or his order, before any commission of bankruptcy was sued out against him, and before the defendant had any notice that *Pointz* was a bankrupt, or had done any act of bankruptcy, and without any trust or condition, other than that the defendant by parol did declare, that if *Pointz* repaid the money paid him by the defendant, and interest for the same, at the [28] time agreed on, and then past, that then he would re-deliver to *Pointz* the goods; and averred, that *Pointz* failed to pay the money or any part of it at the time agreed on; and that *Pointz* two years since agreed, that the same should be sold by *J. S.* and that by the money so to be raised, the defendant should be paid his money with interest, and the surplus to *Pointz*; and averred, that the money raised by sale was 200*l.* short of what *Pointz* owed him, and which 200*l.* was still due; and that 19 *Octobris* (80) *Pointz* gave the defendant a general release to that time; and that the defendant had no dealings with him since: and the defendant further pleaded, that he had been examined by the commissioners, as far as by law he was obliged; and insisted, that being a purchaser so as aforesaid, he ought not to be put to answer, to subject himself to an action, which the bill

ABERY v. WILLIAMS.

aimed at, by pressing a discovery of what goods of the bankrupt's came to the defendant's hands.

The *Lord Chancellor* allowed the plea; and said, the law was hard against tradesmen, that dealt with bankrupts before notice; and the assignees ought not to be assisted in equity in any such case. (1)

Note.—There was the like rule before given in the case of one *Portman* the banker, (2) in the present *Lord Chancellor's* time.

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(1) A commission issued is notice of the bankruptcy, being a public act, of which all are bound to take notice, not so an act of bankruptcy. By assignment of equity of redemption by mortgagor after bankruptcy, but before assignment, though consideration actually paid, and as it should seem without notice of act of bankruptcy, nothing passed to the assignee, the mortgagor having nothing to convey. But this court will not compel discovery from *bonâ fide* purchaser for a valuable consideration, and without notice of an act of bankruptcy. *Collett* v. *De Gols & al'* Ca. Temp. Tal. 65, and cases there cited, [sed vide as to the authority of *Collet* v. *De Gols*, *Ex parte Herbert*, 13 Ves. 183.,] et vide *Bankrupt's* case, 2 Rep. 25. And where a sum of money is borrowed by *A.* of *B.* and then *B.* becomes bankrupt, and afterwards *A.* repays the loan, this is a good repayment, and money considered as though never borrowed. *Ex parte Congalton in Re Elizabeth Tyler*, 3 Bro. Ch. Rep. 47. et vide *Wilker* v. *Boddington*, post 2 vol. 599. *Brown* v. *Williams*, 2 Ch. Ca. 135.

(2) Seems to be *Perrat* v. *Ballard*, 2 Ch. Ca. 72.

Case 24.

PUREFOY *versus* PUREFOY.

Eq. Ca. Ab. 138. pl. 1. S. C.

Where a deed of trust is made for payment of debts it shall extend only to debts contracted at the time of making the deed.

[29]

J. S. makes a deed of trust for the payment of his debts, to take effect after his death. The words in the deed were, *moneys owing by him;* (1) and a schedule was annexed to the deed, wherein mention was made of 1,000*l.* owing to *A.* and 500*l.* owing to *B.*, and then there is this *item; viz.* the sum of 3,000*l.* owing to other persons.

It was urged, that the lands should stand charged by this deed, not only for such debts as were owing by him at the time of making thereof, but for any debts he afterwards contracted, so as they did not exceed the sum mentioned in the schedule.

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(1) The words as stated in Reg. Lib. are "In trust after the death of him "and his wife, to pay or cause to be "paid the debts in a schedule to the "said deed annexed, *viz.* to *C. S.* "2,000*l.* to *J. S.* 1,000*l.* and to pay se-"veral other debts of the said *G. P.* "the settlor amounting to 3,400*l. toto* "6,400*l.*"

PUREFOY v. PUREFOY.

But it was decreed, that those lands should stand charged only with such debts as were owing at the time of making of the deed. And the *Lord Chancellor* said, it was so in all cases, where a deed is made for payment of debts owing, unless it be expressed to be for payment of such other debts, as he should afterward contract, or to that effect.

In this case the heir at law by his bill prayed an account against a trustee for two several estates that were conveyed unto him upon trust for payment of several and distinct debts; (1) and now would have had his bill dismissed, as to one of the estates, and have had the account taken for the other only.

But it was decreed, that an entire account should be taken of both estates; (2) for that it is allowed as a good cause of demurrer in this court, that a bill is brought for part of a matter only, which is proper for one entire account, because the plaintiff shall not split causes and make a multiplicity of suits.

And Mr. *Hutchins* said, where a bill is brought to redeem two mortgages, and there is more money lent upon one of them than the estate is worth, the plaintiff shall not elect to redeem one, and leave the heavier mortgage unredeemed, but shall be compelled to take both or none. (3)

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(1) One of the estates not mentioned in the deed of trust, was mortgaged by the plaintiff's father to defendant *Purefoy* several years after the deed of trust, to secure 5,300*l.* and interest, advanced by him for payment of part of the schedule debts of plaintiff's said father, mentioned in the deed of trust. R. L.

(2) The accounts to be kept separate. R. L.

(3) Reg. Lib. 1681. fol. 335. So as to the heir, *Margrave* v. *Le Hooke*, post 2 vol. 207. *Pope* v. *Onslow*, ibid. 286. et vide *Cator* v. *Charlton*, 21st June, 1775. Reg. Lib. 1774. *Collet* v. *Munden*, May 31, 1786. Reg. Lib. 1785. And the doctrine fully recognized in *Jones* v. *Smith*, 2 Ves. jun. 377. [And see *Willie* v. *Lugg*, 2 Eden, 78. *Ireson* v. *Denn*, 2 Cox, 425.] But where tenant for life remainder in tail, and mortgage by tenant for life, and then mortgage by remainderman on death of tenant for life, redemption decreed on payment of the second mortgage money only. *Bromley* v. *Hammond*, 2 Ch. Ca. 23. But where husband and wife seized of lands in right of the wife by fine and deed mortgage for 400*l.* and then pay part, and afterwards take up other moneys on the same mortgage but no new fine levied, decreed that heir should pay both sums, or be foreclosed, *Rayson* v. *Sacheverel*, post 41. 2 Ch. Ca. 98. The rule appears formerly to have been as general with regard to tacking bond debt also to mortgage, *Baxter* v. *Manning*, post 244. *Shuttleworth* v. *Laywick*, post 245. *Coleman* v. *Winch*, 1 P. Wms. 775, and cases in note there, but by the later cases the mortgagee cannot tack a bond to his mortgage, as against the mortgagor or creditors, but only as against the heir of mortgagor or devisee within the statute of fraudulent devises, and that to pre-

vent circuity of action. *Anon.* 2 Vez. 662. *Hamerton* v. *Rogers*, 1 Ves. jun. 513. Vide also *Challis* v. *Casborne*, Pre. Chan. 407. 1 Eq. Ca. Ab. 325. pl. 9. *Powis* v. *Corbett*, 3 Atk. 556. *Jones* v. *Smith*, ub. sup. And not even as against the heir, where the descent is broke. *Heames* v. *Bance*, 3 Atk. 630. Nor as against devisee, where there are intervening incumbrances of a superior nature between the mortgagee's mortgage and his bond. *Powis* v. *Corbet*, ub. sup. Nor can the mortgagee tack his bond as against the alienee of the heir of the mortgagor, being a purchaser for a valuable consideration. *Bayley* v. *Robson*, Pre. Chan. 89. *Coleman* v. *Winch*, ub. sup. *Troughton* v. *Troughton*, 1 Vez. 86. It appears in the case of executors that when testator mortgagor dies indebted by mortgage, and on simple contract, that executor shall not redeem mortgage without payment of simple contract debt also, *Eccles* v. *Thawill*, Pre. Chan. 18. *Anon.* post 2 vol. 177. So said also in *Demandray* v. *Metcalf*, Pre. Chan. 421. *Coleman* v. *Winch*, ub. sup.

Case 25.

FANE *and* FANE.

A. by will directs 1,000*l.* to be laid out in her funeral, and raised out of her plate and jewels, and then gives the rest of her goods and chattels to her executors:—And in another clause gives her executors 100*l.* a-piece for their trouble, and after debts and legacies paid, gives all the rest of her personal estate to the children of *B.* Decreed the whole surplus to the children.

THE Countess Dowager of *Bath*, by her last will, devised divers specific legacies, and that 1,000*l.* should be laid out in her funeral, to be raised out of her plate and jewels, and then adds, *I give the rest of my goods and chattels unto my executors*, and afterwards in another clause, *I give unto my executors the sum of* 100*l. a-piece for their care and trouble, and after my debts and legacies paid, I give all the rest of my personal estate unto the children of Sir* Francis Fane, *the money to be paid into the hands of their father;* and makes Sir *Francis Fane*, Sir *Henry Fane*, and Mr. *Cobb* her executors, &c.

Mr. Serjeant *Maynard* would have had this will so construed, that both the clauses might stand together; *viz.*—That the executors should have had all the rest and residue of the goods and chattels, and that the children as residuary legatees should have had only all the rest of the money: or, if the words, *goods and chattels*, should be construed to comprehend all the personal estate, so as the clauses could not be reconciled, Mr. *Solicitor* pressed, that the children and the executors should be joint residuary legatees; as where land in the same will is first devised to one, and afterwards to another, they shall take it between them, notwithstanding my Lord *Coke's* opinion, that the latter clause revoked the first. (1)

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(1) 1 Inst. 112 *b.* et vide *Coke* v. *Bullock*, Cro. Jac. p. 49.

FANE *and* FANE.

But it was decreed by the *Lord Chancellor*, that the children should have the entire residuary estate.

1*st*. Because the executors have 100*l*. a-piece devised to them.

2*dly*. Although the words of the will are, as was observed by Mr. Serjeant *Maynard*, that the moneys should be paid into the father's hands, yet *that* shall not be taken to explain what personal estate the testatrix intended them, *viz*. only the rest of the money and debts, as Mr. Serjeant would have it. And it cannot be thought that my Lady *Bath* intended to make so nice a difference between her goods and chattels, and her personal estate.

[31]

3*dly*. For that one may aver the trust of a personal estate: (1) and Mr. *Cobb*, one of the executors, swears my lady's intent was, that the children should have the residue of all her personal estate. (2)

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(1) But no averment admitted of real estate, *Lee* v. Sir *Robert Henley*, post 38.

(2) Vide Lady *Gainsborough's* case, post 2 vol. 252. Lady *Granville* v. Duchess of *Beaufort*, 1 P. Wms. 114, and cases there cited. So it appears in the case of money arising by sale of land. *Crumpton* v. *North*, cited in Lady *Gainsborough's* case, ub. sup. *Taylor* v. *Taylor*, 1 Atk. 447. *Ulrich* v. *Litchfield*, 2 Atk. 373. So where one by his will makes *A. B.* and *C.* executors in trust, and names no particular trusts, and gives them 20*s*. a-piece for a remembrance above their charges, parol evidence admitted that this was a trust for the wife only, *Pring* v. *Pring*, post 2 vol. 99. *Cordell* v. *Noden*, ibid. 148. and Pre. Ch. 12. And no doctrine seems to be more settled in equity than that parol evidence may be admitted to explain latent ambiguity in the testator's intent in disposing of his personal estate, and to ascertain the person or thing meant to be described, as distinct from patent ambiguity. *Hodgson & Al.* v. *Hodgson & Al.* Prec. Ch. 229, post 2 vol. 593. *Pendleton* v. *Grant*, ibid. 517. *Harris* v. *Bishop of Lincoln*, 2 P. Wms. 135. *Ulrich* v. *Litchfield*, 2 Atk. 373, and cases cited in note there. *Baugh* v. *Read*, 1 Ves. jun. 259, and cases there cited. *Standen* v. *Standen*, 2 Ves. jun. 592. *Barrow* v. *Greenough*, 3 Ves. 152., where paper written by the defendant, together with parol evidence, was admitted to encrease provision by will. So evidence of advancement by way of satisfaction of legacy admitted, *Rosewell* v. *Bennett*, 3 Atk. 77. *Et è contrà* that a portion should not be a satisfaction of legacy, *Debeze* v. *Mann*, 2 Bro. Ch. Rep. 165. 519. So where executor trustee for next of kin, dict. *Trimmer* v. *Bayne*, 7 Ves. 518. But not in case of bequest of residue, *Freemantle* v. *Bankes*, 5 Ves. 85. Nor to shew the intention of the testator against the face of the wiill, sic dict. *Cambridge* v. *Rous*, 8 Ves. 22. Nor in the case of devise of lands. *Towers* v. *Moor*, post 2 vol. 98. So evidence of conversations with the person who drew the will, to shew that testatrix had no other real estate rejected, *Standen* v. *Standen*, 2 Ves. jun. 591. But parol evidence admissible, to rebut a resulting trust, even in the case of a real estate, *Lake* v. *Lake*, Amb. 126. From these cases it appears, 1st. That a long succession of judges in equity have felt great reluctance to admit parol evidence in the explanation of testator's intention to the extent it has gained; 2dly, That it has obtained in many

FANE *and* FANE. It was therefore decreed, that the residue of the money should be paid into their father's hands, according to the will, and the rest of the personal estate delivered to the children. (1)

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cases, and to a great extent; but thirdly, that in order to be received it ought to be clear. [The ground of its admissibility is that it is adduced to rebut a presumption against the legal title of the executor. Mr. *Cox's* note (1) to *Rachfield* v. *Careless*, 2 P. Wms. 158. The next of kin cannot read parol evidence for the purpose of originally raising this presumption; but if the executor has read such evidence to rebut it, they may do so to fortify it. *White* v. *Williams*, Coop. 58. 3 V. & B. 72. *Bishop of Cloyne* v. *Young*, 2 Vez. 91. See further on this subject *Williams* v. *Jones*, 10 Ves. 77. *Walton* v. *Walton*, 14 Ves. 318. *Langham* v. *Sanford*, 17 Ves. 435. 2 Mer. 6. *Gladding* v. *Yapp*, 5 Madd. 56. *Lynn* v. *Beaver*, 1 Turner, 63.]

(1) Vide *Foster* v. *Munt*, post 473. *Petit* v. *Smith*, 1 P. Wms. 7. and *Farrington* v. *Knightley*, 1 P. Wms. 544, and cases in note in which the doctrine on this subject is fully investigated. And no difference where additional personal estate acquired long after making the will, in conformity to the rule of law that the will of personal estate has relation to the time of testator's death. *Cordell* v. *Noden*, Pre. Chan. 12. Where lands are devised to executors, to be sold for several purposes, and the surplus expressly devised to them, there can be no resulting trust for the benefit of the heir, *Dormer* v. *Bertie*, Pre. Chan. 94.

Case 26. BROWN *versus* ALLEN.

Eq. Ca. Ab. 298. pl. 3. S. C.

In case of deficiency of assets a specific legatee shall not abate in proportion with pecuniary legatees.

But one pecuniary legatee shall abate in proportion with the rest, though his legacy is directed to be paid in the first place.

IT was declared by the *Lord Chancellor*, that where a man devises a specific legacy, there though the other legacies fall short, yet the legatee must have his specific legacy entire: (1) But where a man devises several legacies, as 100*l.*

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(1) Reg. Lib. 1680. A. fol. 205. 222. And said it is a settled doctrine in equity that a specific legacy is never broke into in order to make good a pecuniary one. *Herne* v. *Mericke*, Salk. 416. *Masters* v. *Masters*, 1 P. Wms. 422. *Hinton* v. *Pinke*, ibid. 539. *Drinkwater* v. *Falconer*, 2 Vez. 624. Nor is a specific legatee of a mortgage, bound by an account settled between the executor of the mortgagee and the mortgagor, *Langley* v. Earl of *Oxford*, Amb. 17. So not to contribute to costs in aid of pecuniary legacies, but he must contribute so far as the costs of inquiry respect his own specific legacy, ibid. et vide *Howse* v. *Chapman*, 4 Ves. 542. *Barton* v. *Cooke*, 5 Ves. 464.—But where a freeman of *London* devised a lease for years to *J. S.* who is evicted of a moiety thereof by the widow claiming it by the custom, the specific legatee shall have no satisfaction out of the surplus, testator having power only to dispose of a moiety, *Webb* v. *Webb*, post 2 vol. 111. And under circumstances a specific legatee shall be

to one, and 50*l.* to another, &c. there although he directs the legacy of 100*l.* to be paid *in the first place*, yet if the other legacies fall short, there the legatee of the 100*l.* must make a proportionable abatement of his legacy. (1)

BROWN v. ALLEN.

charged with the payment of a pecuniary legacy. *Sayer* v. *Sayer*, Pre. Ch. 392. Gilb. Rep. 87. So legatees of specific parts of a chattel liable to abate amongst themselves upon deficiency of the specific thing bequeathed. *Sleech* v. *Thorington*, 2 Vez. 563. [*Page* v. *Leapingwell*, 18 Ves. 463.] So on a deficiency of general assets for payment of debts, *Long* v. *Short*, 1 P. Wms. 403. So specific legatees of distinct chattels. Duke of *Devon* v. *Atkins*, 2 P. Wms. 382. Sed vide *Gibson* v. *Scudamore*, Mose. 7. *Hinton* v. *Pinke*, ub. sup. So where a devise of an estate in mortgage, and bequests of several specific legacies, the specific legatees (on a deficiency) shall abate before the mortgaged premises shall be affected, *Warner* v. *Haynes*, Kel. 3. As to what shall constitute the distinction between specific and general legacy, vide Mr. Cox's note to *Hinton* v. *Pinke*, 1 P. Wms. 540, and bequest of residue not specific, *Bowaman* v. *Reeve*, Pre. Ch. 577. et vide *Richardson* v. *Brown*, 4 Ves. 177. *Chaworth* v. *Beech*, ibid. 555. *Innes* v. *Johnson*, ibid. 568. *Kirby* v. *Potter*, ibid. 748. *Nesbitt* v. *Murray*, 5 Ves. 149. *Raymond* v. *Brodbelt*, ibid. 205. *Howe* v. Earl of *Dartmouth*, 7 Ves. 137. *Sibley* v. *Perry*, ibid. 522. [*Land* v. *Devaynes*, 4 Bro. Cha. Rep. 537. *Gillaume* v. *Adderley*, 15 Ves. 384. *Apreece* v. *Apreece*, 1 V. & B. 364. *Hill* v. *Mason*, 1 J. & W. 248. *Graves* v. *Hughes*, 4 Madd. 381.]

(1) [So *Lewin* v. *Lewin*, 2 Ves. 415. *Beeston* v. *Booth*, 4 Madd. 161.]

SMITHBY *versus* HINTON.

Case 27.

ALTHOUGH an executor does actually release, yet he must be made a party to the suit. (1)

(1) Reg. Lib. 1681. B. fol. 444, it appears, that defendants, the surviving executors, who had released, put in answer and disclaimer, vide *Blue* v. *Marshall & Ux.* 3 P. Wms. 381. But executor, who never administered need not be made a party, Went. Off. Executor 95, et vide *Wankford* v. *Wankford*, 1 Salk. 307, vide *Hensloe's* case, 9 Co. 37. Letters of administration may be taken out after the commencement of the suit, *Humphreys* v. *Humphreys*, 3 P. Wms. 349.

GEE *versus* SPENCER.

[32]

Case 28.

A MAN possessed of a lease for *three* lives of the rectory of *Orpington*, in *Kent*, devised the rectory by his last will; but that being void, it came to his three daughters as coheirs and special occupants. There being a suit touching this rectory in Chancery, the husband of one of the daughters fearing to be in

Eq. Ca. Ab. 170. pl. 4. S. C. Release set aside by reason of the misapprehension of the party.

GEE v. SPENCER.

law, and being made to believe, that he should be forced to pay costs, released the arrears that should be coming to him for his share of the rectory to the other sisters, who were to bear the charge of the suit; his share of the arrears amounted to 1,000*l.*

This release was set aside, and *Luxford's* case cited *that a misapprehension in the party shall avoid his release.* (1)

(1) Reg. Lib. 1681. A. fol. 246. The bill in this case was filed by the widow of the person executing the release, and who was one of the three daughters and coheirs, against one of the other daughters and coheirs, and the defendant decreed to pay the costs, it appearing to the court that the release was obtained by fraud and circumvention. Feme covert heir at law and her husband being drawn in to enter into articles for supplying the defect of a surrender of a copyhold to the use of a will, whereby they were devised to the plaintiff, plaintiff not allowed to carry them into execution in regard the defendants were not apprised of their interest. *Preston & Ux.* v. *Wasey & Ux.* Prec. Chan. 76. Vide also *Jarvis & Ux.* v. *Duke*, ante 19, and cases cited in note there. The principle seems to be that mistakes and misapprehensions in the drawing (and *a fortiori* in the executing) of deeds, form as much a head of relief in equity as fraud and imposition. *Simpson* v. *Vaughan*, 2 Atk. 33. *Langley* v. *Brown*, ibid. p. 203.

Case 29.

SILWAY *versus* COMPTON.

Eq Ca. Ab. 104. pl. 8.

A COMMON, that has been inclosed for thirty years, shall not afterwards be thrown open. (1)

(1) In Reg. Lib. 1681. B. fol. 167, there is the following statement of a case of *Silway* v. *Compton.* In this case the plaintiff was Vicar of the parish church of *Lyneham Com. Wilts*, and the bill was filed by him against *Robert Compton*, and *Susanna* his wife, and which *Susanna* appeared to be the sister and heir at law of, and claimed the premises in question, under a settlement made by *Humphrey Long*, deceased, and which *Humphrey Long* in his lifetime claimed, under a grant from the crown, to be owner of the rectory, and patron of the vicarage of *Lyneham* aforesaid, and the bill was for settling the profits of the said vicarage of the parish church of *Lyneham*, which had been void for sixteen years, and without any divine service there done, until the *Lord Bishop of Sarum* taking notice thereof, and of a lapse incurred to his Majesty, prevailed with the *Lord Chancellor* to procure the plaintiff to be presented to the said vicarage, the profits or maintenance of the said vicarage to be 13*l. per annum*, and to be paid out of such part of the rectory as belonged to Mr. *Long* only, the remainder thereof appearing to belong to other persons, claiming, as purchasers, for valuable consideration, and without notice of the incumbrance of 13*l. per annum.* This bill appears to have been founded on a decretal order, made by the court on the 25th *October*, 1679, on a bill filed for the same purpose by the present plaintiff, against the said *Humphrey Long*, deceased, and which order was that the said 13*l. per annum*, should for ever thereafter be paid out of, and charged upon the

portion of the said rectory, claimed by *Long*, to plaintiff and his successors half yearly, and that defendant *Long* should pay to plaintiff *the arrears* of the said 13*l. per annum*, ever since the decease of ——— *Hayes*, in the suit mentioned, the last vicar there, and the costs of the suit to be paid out of *Long's* proportion of the said rectory, and the master was to compute the arrears and tax the costs, and before he had so done *Long* died, and then the plaintiff filed his present bill of revivor against *Compton* and his wife, claiming as aforesaid. Defendants by their answer denied that the rectory descended to her as heir at law of *Long*, and set forth their titles under the settlement of defendant *Susannah's* father. On this bill of revivor the aforesaid decretal order was confirmed, except that the 13*l.* was to be paid quarterly, and the costs of the then suit to be paid out of defendant's proportion of the rectory, unless cause.

THICKNESS *versus* VERNON.

Case 30.

A MAN makes *A.* and *B.* his executors, and directs that 2,000*l.* of his personal estate shall be laid out in land for the benefit of his wife for life, and then to his executors to *be equally divided betwixt them.* The wife and one of the executors died before any disposition made of this money.

A devise to two persons to be equally divided between them, makes a tenancy in common.

Decreed by the *Lord Chancellor*, that this money should not survive: and he cited a case in the late times, where a man devised his personal estate unto two persons equally, and there by the advice of the Lord Chief Justice *Rolle* it was decreed, it should not survive. (1)

[33]

(1) It appears that the testator by his will, also gave to his said executors, after payment of debts and legacies, the residue of his personal estate without more, but the bill charged that as to the surplus of the testator's personal estate, it had been agreed that the same should be equally divided between them, and no advantage taken of survivorship, and which agreement was proved in the cause, and as to this the court decreed accordingly, Reg. Lib. 1681. B. fol. 306, vide *Kew* v. *Rouse & Ux.* post 353.

HOWARD *versus* HARRIS.

Case 31.

Eq. Ca. Ab. 312. pl. 11. 2 Ch. Ca. 147. S. C.

HOWARD mortgages land, and the proviso for redemption was thus: provided that I myself, or the heirs males of my body may redeem. (1) The question was, whether his as-

Proviso in a mortgage that the mortgagor or the heirs male of his body might redeem.

(1) The words of the proviso are, "that if he or the heirs of his body, "paid the 565*l.* the mortgage money "and interest at two years end, the "conveyance to be void." Then a further sum of money was borrowed by

HOWARD v. HARRIS.

Decreed the assignee might redeem. *Post* Case 191. and 212. *Vide ante* Case 6.

signee should redeem it? and it was decreed, he should; for, if once a mortgage always a mortgage.

In this case part of the mortgaged estate happened to be in Mrs. *Howard's* jointure, and it was admitted that she thereby was entitled to a redemption of the whole mortgage; and so it was adjudged in the case of *Browne* and *Edwards*. (1)

Howard, and the above mentioned proviso was released by deed, and another proviso contained in such last-mentioned deed "that if he, or the "heirs of his body begotten, should, "at a given day therein mentioned pay "1,000*l.* then, &c." And in this case there was a covenant on the part of the mortgagor that no person should have the power or benefit of redemption, but only himself and the heirs of his body. On the effect of such a covenant, vide *Newcomb* v. *Bonham*, ante, p. 7. *Note*, In the principal case a plea, as to the redemption, was put in, but over-ruled.

(1) Reg. Lib. 1681. A. fol. 260. So, a dowress, paying her proportion of the mortgage money, has a right to redeem a mortgage, and to hold over, till satisfied, the rest, *Palmes* v. *Danby*, Pre. Chan. 137. And for further investigation of this subject, vide *Powell's* Law of Mort. vol. 2. ch. 2.

Case 32.

Sir JAMES HAYES *versus* KINGDOME.

Joint-tenants. Survivorship.

LORD RANELAGH, *Dashwood*, and five others upon their farming of the *Irish* excise entered into articles, that if any of them died their parts should survive; and a covenant, that none of them should assign without licence from the rest. One with licence, but not in all points agreeing with the articles, assigns to his son and a third person in consideration of five shillings, and dies. The question was, whether his assignees should come in for his share. But it was objected that this assignment should only impower the assignees to act and come in as agents, but should not entitle them to the interest and benefit of the assignor's share.

It was said by the *Lord Chancellor*, if there had been no covenant it should survive, yet in equity it ought, by reason of the joint charge and expence. (1) If there had been any agreement amongst the farmers that it should not survive,

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(1) Vide *Jefferys* v. *Small*, post 217. *Usher* v. *Aylesworth*, post 360. *Fisher* v. *Wigg*, Lord *Raymond's Rep.* 631. 1 P. Wms. 14. *Rous & Ux.* v. *White*, 2 Show. 452. *Rigden* v. *Vallier*, 3 Atk. 734. 2 Ves. 258. [According to Lord *Nottingham's* own report, he said quite the contrary, namely, that if there had *not* been a covenant for survivorship, *equity would have hindered it.*—MS. note in Mr. *Hargrave's* Vernon.]

that might have altered the case; but that is not so much as pretended, nor is there the least proof of it: and the consideration of the assignment being but five shillings, it cannot be thought it was ever intended that the interest of the assignor should pass by it, but only an agency or power of acting: and had the assignment been made by Mr. *Lemuel Kingdome* to his son only, there the consideration might have been for natural love and affection; but here the assignment is made to his son and another person; so *that* consideration is out of the case. And the bill to have the assignment made good was dismissed. (1)

(1) Vide *Lee* v. Sir *Robert Henley* & *Al.* post 37.

PERRIS *versus* ROBERTS.

Case 33.

Eq.Ca. Ab. 147. pl. 3, entitled *Bevis* v. *Roberts*, 2 Ch. Ca. 83. S. C.

PERRIS became bound as surety for *J. S.* unto *Roberts*. *J. S.* owes *Roberts* a further debt upon simple contract. *J. S.* and *Roberts* come to a stated account for all moneys owing to *Roberts*, as well for what was due on the bond, in which *Perris* was bound as surety, as for what was due to *Roberts* upon simple contract: and there being due to *Roberts* on the foot of the account 85*l.* *J. S.* makes him a bill of sale towards satisfaction of the whole debt.

A. is indebted by bond (in which *J. S.* is bound as surety) and also by simple contract to *B. A.* states an account of both debts with *B.* and makes a bill of sale, for securing the balance, which proves deficient.

It was insisted by Mr. *Solicitor-General* and others of counsel for *Roberts*, that the money raised by this bill of sale should in the first place be applied to satisfy the debt due on simple contract, and then what remained, to sink the debt for which *Perris* stood bound as surety; and the rather, for that in the bill of sale it is mentioned to be as a security: and there is no proof or pretence of an agreement or direction, that this money should be applied to the debt for which *Perris* stood bound; and to make any other construction would be to construe a man out of his debt.

On a bill by the surety decreed the money arising by the bill of sale should be applied towards discharge of both debts in proportion.

To this opinion at first the *Lord Chancellor* seemed to incline: but then it was insisted by Mr. *Hutchins* and others of counsel with *Perris*, that it is natural to suppose, that where a man owes a debt upon specialty, for which others are bound as his sureties, he would in the first place take care to discharge that debt before another debt that was due on simple contract only. But they did not insist that the

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PERRIS v. ROBERTS.

moneys raised by the bill of sale should in the first place be entirely applied to satisfy the debt for which *Perris* stood bound, but that both the debts, *that* upon specialty, and *that* upon simple contract, being blended and thrown together in one account, and then a bill of sale made towards satisfaction of the whole debt, it was but reason it should be applied proportionably, as well for the sinking of the debt for which *Perris* stood bound, as towards payment in proportion of the debt due on simple contract.

And it was so decreed by the *Lord Chancellor*, and solely upon this reason, *viz.* that both the debts had been cast into one stated account, and the bill of sale made towards satisfaction of the whole debt.

But Mr. *Solicitor* was strong in his opinion against the decree. (1)

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(1) This decree was made on a re-hearing, Reg. Lib. 1681. B. fol. 311, vide *Heyward* v. *Lomax*, ante p. 24, and cases cited in note there.

Case 34.

DANVERS *versus* Earl of CLARENDON.

Eq.Ca.Ab. 202. pl. 21. S. C.

Goods devised to *A.* for life, and after the death of *A.* to the heir of *B.* *B.* dies in the life of *A.*

THE late Earl of *D.* by his will devised all his goods in *Cornbury House* to the Lady *Gargrave* for life, and after her decease to the heir of Sir *John Danvers*: and the point was, whether he that was heir of Sir *John Danvers* should take these goods as devisee, and the said goods go to his executors, although such heir die in the lifetime of the Lady *Gargrave*: or whether he that was heir of Sir *John Danvers* at the time of the Lady *Gargrave's* death should have them.

And it was urged by Mr. *W. Williams*, that these goods were only the furniture of the capital house, and were *quasi* an *heir-loom*.

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Decreed the goods should go to him that was heir of *B.* at his death, and not to him who was his heir at the death of *A.*

But the *Lord Chancellor* was of opinion, that they absolutely vested in the person of him, that was heir of Sir *John Danvers* at the time of his death; and took notice that the Lord *Clarendon* in his answer swore all the judges of *England* had so given their opinions: and this opinion of the *Chancellor* was confirmed by another clause in the will, wherein *Henry Danvers*, who was then heir of Sir *John Danvers*, was mentioned by name: and it was thereon de-

creed accordingly, that they vested in *Henry*, who was heir of Sir *John Dunvers* at his death. (1)

DANVERS v. CLARENDON.

(1) Vide *Pleydell* v. *Pleydell*, 1 P. Wms. 750. *Sheppard* v. *Lessingham*, Amb. 122.

POCKLEY *versus* POCKLEY.

Case 35.

Eq.Ca. Ab. 270. pl. 5. 2 Ch.Ca.84.S.C.

Hæres factus, or a devisee shall have the personal estate applied in ease of the real.

UPON a rehearing, the case was thus. Sir *Jeremy Smith* lends *Robinson* 1,600*l.* with an intent to lend 1,400*l.* more, and takes a mortgage for the money in *Pockley's* name. Sir *Jeremy Smith* dies. His executors refuse to lend the other 1,400*l.* hereupon *Pockley* advances 1,500*l.* of his own money, and purchases an annuity in fee out of the lands contained in the mortgage, and takes an assignment of the mortgage to protect his purchase, declaring the uses thereof to be for the benefit of him and his heirs; and then makes his will, and appoints all his debts to be paid, and particularly mentions the debt of 1,600*l.* to Sir *Jeremy Smith's* estate, and devises his real estate unto his nephew: and *Pockley* dying within the province of *York* without child, where by the custom his widow is entitled to a moiety of his personal estate. (1)

The question was between the widow and the nephew, who was devisee of the real estate, whether this debt of 1,600*l.* to Sir *Jeremy Smith* should be paid out of the personal estate.

It was insisted by the counsel for the widow, that in case this 1,600*l.* debt was not really a debt of *Pockley's*, his declaring it by will to be his debt, and appointing it to be paid out of his personal estate, would not alter the case; for that his will could not work upon the customary part; and to that purpose they cited the Lady *Dethick's* case, wherein it was adjudged, that even a voluntary conveyance could not affect the customary part: and to prove that it was not in truth his debt, they compared it to the case where a man purchases the equity of redemption; in that case although

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A man purchases an equity of redemption and dies. The mortgage shall not be paid out of the personal estate for the benefit of the heir; it not being the ancestor's debt.

(1) A mortgage shall be paid out of the personal estate, in preference to the customary or orphanage part, by the custom of *London*, *Ball* v. *Ball*, by Lord *Macclesfield*, 1720, cited *Rider* v. *Wager*, 2 P. Wms. 335, in note.

POCKLEY v. POCKLEY.

he purchases the land subject to the debt due on the mortgage, and must hold the lands subject to that debt; yet *that* debt can never charge his person; nor doth it in any sort become his own proper debt; and from hence it was urged, that this annuity should stand charged with the 1,600*l.* and that it was never the personal debt of *Pockley:* and though it has been lately resolved, that *hæres factus* shall be allowed the benefit of having the real estate discharged, yet such an heir shall never prevail against the custom.

But it was decreed by the *Lord Chancellor*, that this debt due to Sir *Jeremy Smith's* estate should be paid out of the personal estate; and chiefly for that *Pockley* by his will (which were the words of a dying man) had declared it to be his debt, and appointed it to be paid out of his personal estate, and that *Pockley* had got the mortgage so transferred as to protect his purchase; and it was said by the *Lord Chancellor*, that not only he, who is *hæres factus*, shall pray in aid of the personal estate to discharge the real, but even an *ordinary* devisee shall have that benefit. (1)

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(1) The case in the register's book, from the bill and answer, is stated thus. *John Pockley*, deceased, the plaintiff's uncle, being seized of a rent charge of 250*l. per annum* issuing out of the manor of *Burkson*, of the estate of *Robinson*, and also of several manors, lands, &c. freehold and copyhold, together with the yearly rent charge of the value of 800*l. per annum*, and possessed of a personal estate of the amount of 2,500*l.* and upwards, by will of the 19th *September*, 1679, after reciting that he was intrusted with the portions of *Frances Smith*, the now defendant, and *John Smith*, the younger son of Sir *Jeremy Smith*, to the amount of 2,500*l.* or thereabouts, his will was, (the said *John Smith* being dead) that it should be paid to *Frances Smith*, and in case she should die, then, according to the said Sir *Jeremy Smith's* will, and that all other his debts and legacies, he willed and appointed should be paid out of his personal estate, and in case it would not extend to pay the same, then he charged so much as his personal estate would not extend to pay, upon his real estate, except his wife's jointure lands, and those he should give her by his will in addition thereto. He gave his wife, in addition to her jointure, and what she might claim out of his real and personal estate by law or custom, his lands in *A.* for her life only, and then reciting that he had surrendered his copyholds to the use of his will, he gave the same, and all his freehold lands, &c. rent charges and annuities, and other his lands and hereditaments in possession and reversion, charged nevertheless with the payment of his debts and legacies, in case his personal estate would not extend to pay the same, to plaintiff *George Pockley* and his assigns for life, with remainder to his first and other sons in tail male, with remainder over, and he gave the residue of his personal estate to the plaintiff. The executors named in the will having renounced the probate thereof, Mrs. *Pockley*, the widow, obtained administration, and insisted that the rent charge of 250*l. per annum* was only a security for 4,100*l.* the amount of the purchase money of the rent charge, and that the same ought to make part of the testator's personal estate. And the defendant *Smith*, insisted that the said 2,500*l.*

and interest was secured, and ought to be paid out of the manor of *Burkson*, and hoped she might be permitted to enjoy such security as was only intended for the same. But the court declared that the deed of grant of the rent charge of 250*l.* to *John Pockley*, was an absolute estate and not a mortgage,* and ordered the debt and interest owing to *Smith*, to be paid out of the personal estate, as far as the same would extend, and if it should fall short then out of the rents and profits of the real estate, Reg. Lib. B. 1680. fol. 646. See *Starling* v. *Draper's Company*, Finch. Rep. 401. The principal case reported under the name of *Popley* v. *Popley*, 2 Ch. Ca. p. 84. Contra *Cornish* v. *Mew*, 1 Ch. Ca. p. 271. But said he must be *hæres factus* of the whole estate, and not devisee of particular part, *Gower* v. *Mead*, Pre. Ch. 2. So where personal estate given to same person, to whom the lands are given it is liable, *Dolman* v. *Smith*, Pre. Ch. 456. So a portion shall sink as well for the benefit of an *hæres factus* as of an *hæres natus*, as well where devised by will as secured by deed, *Smith* v. *Smith*, post 2 vol. 92. *Yates* v. *Fettiplace*, post 2 vol. 416, cited in *Jennings* v. *Looks*, 2 P. Wms. 277. In *Short* v. *Long*, post 2 vol. 756, the devisee of the real estate and the legatee of the personal, decreed under circumstances to share debts equally. Where the original agreement is such as to constitute a charge in its nature real, there the land shall bear the burthen, *Coventry* v. *Coventry*, 2 P. Wms. 222. And where there is an express devise it shall not be defeated by applying the personal estate to pay off a mortgage, even in favour of an heir at law, sic dict. per *Lord Keeper*, *Hawes* v. *Warner*, post 2 vol. 477. And see *Coventry* v. *Coventry*, ub. sup. *Howel* v. *Price*, 1 P. Wms. 291., and *Evelyn* v. *Evelyn*, 2 P. Wms. 659. and the cases cited in the notes there, which contain the rules and learning of the doctrine in equity, respecting the application of the personal estate, in ease of the real; and for later cases on this head, vide Lord *Compton* v. *Oxenden*, 4 Bro. Ch. Rep. 397. 2 Ves. jun. 261. *Chitty* v. *Parker*, 4 Bro. Ch. Rep. 411. 2 Ves. jun. 271. *Waring* v. *Ward*, 7 Ves. 332. [*Hamilton* v. *Worley*, 4 Bro. Ch. Rep. 199. 2 Ves. jun. 62. *Woods* v. *Huntingford*, 3 Ves. 128. *Butler* v. *Butler*, 5 Ves. 534. *Oxford* v. *Rodney*, 14 Ves. 417. *Lechmere* v. *Charlton*, 15 Ves. 193. *Ruscombe* v. *Hare*, 6 Dow, 1. *Scott* v. *Beecher*, 5 Madd. 96.] And note the distinction taken between *hæres natus* and devisee, in regard to supplying surrender, which this court will not supply against an *hæres natus*, although it will as against an *hæres factus*, *Smith* v. *Baker*, 1 Atk. 386.

* The deed is not stated in Reg. Lib.

LEE *versus* Sir ROBERT HENLEY & *Al.*

Case 36.

Eq. Ca. Ab. 170. pl. 1. S. C.

Omission in a voluntary conveyance not supplied in equity.

THE case was thus. *J. S.* being seised of divers lands in *Dorset*, *Somerset*, and *Devonshire*, (those in *Dorsetshire* being of equal value with those in the other two counties of *Somerset* and *Devonshire*) and having two nephews, one the son of his sister *Henley*, and the other the son of his sister *Lee*, whom he intended to make his heirs; he, to prevent disputes between them about the partition of his estate after his death, by conveyance executed in his lifetime settled all

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LEE v. HENLEY.

the lands to the use of himself for life, (1) remainder to his issue, if he should happen to have any, in tail; and then appointed the lands in *Dorsetshire* to his nephew *Henley*, and the lands in the other counties to his nephew *Lee*. (2) In the enumeration of the particulars of the lands in *Somerset* and *Devonshire*, a farm or manor of about 60*l*. *per ann.* was omitted; but after the limitation of the lands to his nephew *Henley* there were added these general words, *viz. and all other my manors, lands, and tenements, whereof no use is already limited, the same shall be unto the use of my nephew* Henley, &c. (3)

It was insisted by *Henley's* counsel, that this manor or farm, omitted as aforesaid, should pass to *Henley* by virtue of these general words: but it was thereunto answered by *Lee's* counsel, that the omitted farm could not pass within those general words; for that although, when he comes to distribute the lands between his nephews, *that* farm is omitted to be enumerated, yet in the limitation to himself for life, remainder in tail, there mention is made of that farm, and so it is not within the words, *whereof no use has been already limited*, for an use of it was limited unto himself for life: and it was insisted by *Lee's* counsel, that he ought to have this entire farm; for that the scrivener who drew this settlement swore this farm was intended to be settled on *Lee* as well as the rest of the lands in *Somerset* and *Devon*, and that so were his instructions, and that the same was purely the omission of the clerk; (4) and therefore they insisted, that although this was a voluntary conveyance, yet being provision for an heir, the intent of the party might be supplied in equity, and made good by an

(1) Then to the use of the trustees for a term of 200 years.

(2) In the deed as stated in Reg. Lib. the parcels are enumerated and described as lying in certain manors and parishes, but it does not mention the counties.

(3) The entire limitation to *Henley* is in these words, "And as concerning "the messuage and demesnes of *Abbots Wootton*, and other the manors, "messuages, and appurtenances not "before therein limited to any use or "uses, excepting one tenement called "*Brigdown*, from and after the death "of the settlor, and the expiration of "the said term of 200 years, and failure "of issue of the settlor, to the 1st, 2d, "3d and other sons of the said Sir "*Robert Henley*, by the said Dame "*Barbara*, successively in tail, with "remainder to the plaintiff in tail, re-"mainder to plaintiff's younger bro-"ther in tail." Then the trusts of the term are declared.

(4) The answer of *Ford*, who drew the conveyance states, that the testator gave him directions to settle all his manors and lands in *Somerset* and *Devon*, on the plaintiff, and his heirs male, and that the omission of the manor of *Peyton* was occasioned by his oversight.

averment consistent with the deed; (1) and for that purpose they cited the case of *Barrow* and *Barrow*. But the *Lord Chancellor* upon the whole matter did not think fit to decree it for one or other of them, but left the land in question to descend equally between the two nephews. (2)

LEE v. HENLEY.

(1) A trust of personal estate may be averred, vide *Fane* v. *Fane*, ante p. 31.

(2) It is not so; the words of the decree are as follow: "Whereupon, "&c. his Lordship declared, that he "saw no cause, upon reading the "proofs, to alter any of the uses of "the said deed of settlement, and "doth therefore order that the mat-"ter of the said plaintiff's bill, as to "the decree which is thereby prayed "for, the possession of the manor and "farm of *Peyton*, or any relief con-"cerning the said manor and farm, "do stand absolutely dismissed out of "this court." Reg. Lib. 1681. B. fol. 332. It seems to be a principle in equity that wherever a voluntary deed is not sufficient to pass the subject out of the conveyor, it never can be carried into execution without either a valuable, or at least what a court of equity calls a meritorious consideration, as payment of debts, or making provision for a wife or child, *Colman* v. *Sarell*, 1 Ves. jun. 54. 3 Bro. Ch. Rep. 14, et vide *Bonham* v. *Newcomb*, 2 Vent. 364. *Thompson* v. *Attfeild*, post 40. And where there are two voluntary conveyances, he that hath the advantage at law ought to keep it, vide Chief Justice *Treby's* argument in *Bath* v. *Montague's* Case, 3 Chan. Ca. 88. And the one being against the other must be tried at law, ibid 93. And in wills where all are volunteers, the words may be varied, sic dict. per Lord *Hardwicke*. *Bagshaw* v. *Spencer*, 2 Atk. 582.

DE

TERMINO PASCHÆ

[39]

34 *Car. II.* 1682.

IN CURIA CANCELLARIÆ.

Case 37.

MICOE *versus* POWELL & *Ux.* & *Al.*

Eq. Ca. Ab. 40. pl. 7. Ch. Ca. 4. S. C.

An infant entitled to the trust of lands in fee marries without the consent of her father.

MICOE exhibits a bill against *Powell* and his wife and the trustees of the wife's estate, setting forth, that one Sir

The father brings a bill against the husband and wife and her trustees, that a provision might be made for her and her children out of these lands. The husband and wife demur, and the demurrer was allowed.

MICOE v. POWELL.

Samuel Micoe devised unto the plaintiff's son several manors and lands of the annual value of 400*l.* and that the son died without issue, whereby those lands descended to the plaintiff's daughter; and setting forth, that the defendant *Powell* had clandestinely married his daughter without his consent, and had made no provision for, or settlement on her and her children; and that he was informed the defendant *Powell* intended to make his wife, who is now an infant, as soon as she should come of age, to sell her lands and levy a fine of them: and forasmuch as the estate in law of the said lands was in *A.* and *B.* trustees, who could not be compelled to transfer their estate but in this court, but threatened to do it voluntarily, unless prohibited by order of this court; therefore out of a fatherly care of his said daughter, and to the intent that a provision and settlement be made for her, and
[40] that he might be relieved in all and singular the premises, prays process against *Powell* and his wife and the two trustees, &c.

To this bill the defendant *demurred*, because it appeared of the plaintiff's own shewing, that he had no right either in law or equity to the lands in question, and that he does not pretend to be trustee or supervisor thereof, or any ways impowered to inspect the management of the same: and therefore he thinks himself not bound to satisfy his inquisitiveness: neither ought he to be called in question or impleaded in this honourable court touching the same: and for that the plaintiff's bill doth contain no equity, he doth demur in law. (1)

This demurrer was allowed by the *Lord Chancellor*. But he said, if Mr. *Powell* had been plaintiff here in *Chancery* to have the trustees transfer their estate, or for any other favour of the court, then indeed, when he had such a hand upon Mr. *Powell*, he could make him do such things as should be reasonable; but upon this bill there is no colour in it. (2)

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(1) Plaintiff may have an interest in the subject, yet if it appear on the face of the bill that he has not a proper title, a demurrer will hold, *Tourton* v. *Flower*, 3 P. Wms. 371. For the learning on this subject of demurring for want of a right in the thing and title to institute a suit concerning it, vide *Mitford's* Treatise on Pleadings in Equity, 3d edit. p. 125, et seq. and cases there referred to.

(2) Reg. Lib. 1681. B. fol. 357. Wherever the husband sues for a present demand in right of his wife, and an equity attaches, this court will in most cases put terms upon him, vide *Oxendon* v. *Oxendon*, post 2 vol. 493. *Lupton* v. *Tempest*, ibid 626. *Jacobson* v. *Williamson*, 1 P. Wms. 382. *Milner* v. *Colmer*, 2 P. Wms. 639. *Adams* v.

Pierce, 3 P. Wms. 11. [*Brown* v. *Elton*, 3 P. Wms. 202.] and cases cited therein respectively, by which it seems also clear that if the husband has the complete legal title to the personal estate of the wife, equity cannot interpose to the prejudice of such right. The later cases on this head are *Stackpole* v. *Beaumont*, 3 Ves. 89. *Blount* v. *Bestland*, 5 Ves. 515. And the creditors or executors of the husband, or his assignees, he being a bankrupt, can be in no better situation than the husband himself in respect of the wife's equity, *Jewson* v. *Moulson*, 2 Atk. 417. *Middlecome* v. *Marlow*, 2 Atk. 520. *Burdon* v. *Dean*, 2 Ves. jun. 607. *Freeman* v. *Parsley*, 3 Ves. 421. *Lumb* v. *Milnes*, 5 Ves. 517. And the equity of the wife extends to newly acquired property, *Burdon* v. *Dean*, ub. sup. [See further *Salisbury* v. *Newton*, 1 Eden, 370. *Milford* v. *Milford*, 9 Ves. 87. *Wright* v. *Morley*, 11 Ves. 20. *Murray* v. *Elibank*, 10 Ves. 90. 13 Ves. 1. *Beresford* v. *Hobson*, 1 Madd. 373. *Elliott* v. *Cordell*, 5 Madd. 149. *Cordell* v. *Acton*, cited 5 Madd. 162. *Stamper* v. *Barker*, 5 Madd. 157. *Steinmetz* v. *Halthin*, 1 G. &. J. 64. *Johnson* v. *Johnson*, 1 J. & W. 472. *Green* v. *Otte*, 1 S. & S. 250. *Purdew* v. *Jackson*, 1 Russell, 1.]

THOMPSON *versus* ATTFEILD.

Case 38.

Eq. Ca. Ab. 170, D. pl. 2. S. P.

A conveyance by way of feoffment may operate as a covenant to stand seized.

Defect in a voluntary conveyance not supplied in equity.

Otherwise, if made for a provision for children.

In this case it was allowed, although a conveyance be made purporting a feoffment; yet nevertheless it may operate as a covenant to stand seized: (1) and a difference was taken between the several sorts of voluntary conveyances; for though generally a defect in a voluntary conveyance shall not be supplied and made good here, yet if a man voluntarily makes a settlement as a provision for his children, and for their maintenance, such a voluntary conveyance shall be supplied and made good here. (2)

(1) So *Crossing* v. *Scudamore*, 1 Vent. 137. *Stapleton* v. *Stapleton*, 1 Atk. 8. So where conveyance by lease and release, and lease for year lost, the release shall nevertheless operate as a covenant to stand seized, *Brown* v. *Jones*, 1 Atk. 191. So a deed-poll containing disposition of the whole real and personal estate of *A.* being in consideration of love and affection, but without livery, shall be good by way of covenant to stand seized, *Rigden* v. *Vallier*, 2 Vez. 255. Feoffment in future is void, for livery, which is essential to it, cannot give a freehold in future, Co. Lit. 216 *a.* 217 *a.* But a man by covenant to stand seized to the use of another may make an estate to commence *in futuro*, *Cross* v. *Faustenditch*, Cro. Jac. 180. *Osman* v. *Sheafe*, 3 Lev. 370.

(2) The case in the register's book is as follows: *Henry Attfeild*, the defendant's great-grandfather purchased a messuage called *Frogpoole*, and upon the marriage of *William Thompson*, plaintiff's grandfather, with *Mary* his eldest daughter, declared that he had purchased the same for the benefit of *William* and *Mary*, and that he would settle the same accordingly, but the said *H. Attfeild* died before he had made any such settlement, although the said *William* and *Mary* had been in possession of the premises for several years before his death, leaving *J. Att-*

feild, the defendant's grandfather, his son him surviving, who, previous to and in consideration of a marriage which afterwards took effect, between *Anthony Thompson*, plaintiff's father, the son and only child of the said *William* and *Mary*, and *Elizabeth* his daughter settled the said premises on the said *Anthony* and his heirs for ever, and the said *Anthony* was in possession thereof until he died, leaving plaintiff an infant. The bill then states that after his death the said *J. Attfeild*, the settlor, applied to *Mary Thompson*, his sister, and the grandmother of the plaintiff in whose hands the title deeds of the said lands were, and obtained them from her under pretence that the same were defective in law, and that he would cause the same to be rectified, and that he would shew them to counsel, and then would convey a good and lawful estate, so that the same should come forthwith to plaintiff and his heirs, but that instead thereof he got possession of the premises, and into receipt of the rents, and cut timber, and concealed and retained the deeds. The decree, therefore, was on the ground of the execution of the deed of settlement on the valuable consideration of marriage, and that there was no defect therein, save only the form of livery of seisin, that the defendant should deliver up to the plaintiff all the title deeds of the premises, and also the said deed of settlement, and that defendant should execute livery and seisin thereon, and by any other conveyance grant, enfeoff, and confirm the premises to plaintiff, and the heirs of his body, and the plaintiff was to hold the premises free from all incumbrances, made or done by the defendant, and all claiming under him or his late father the settlor, and that defendant should covenant to that purpose, and an account of rents and profits by felling timber or otherwise, Reg. Lib. 1681. B. fol. 412. So in *Lee* v. Sir *Robert Henley* & *Others*, ante 37. *Thorne* v. *Thorne*, post 141. *Bold* v. *Corbet*, Pre. Ch. 84. *Saltern* v. *Melhuish*, Amb. 251. But such conveyance, or a surrender, shall not be supplied in favour of a grandchild, or a natural child, *Watts* v. *Bullas*, 1 P. Wms. 60, and cases there cited. [Nor of a husband, *Moodie* v. *Reid*, 1 Madd. 516; or grandchild, *Perry* v. *Whitehead*, 6 Ves. 544.]

[41] TURNER *and* GWINN.

Case 39.
Eq. Ca. Ab. 139, pl. 6. S.C.

In this case it was said, that a tenant in tail of an equity of redemption may devise it for the payment of debts. (1)

(1) Sed vide *North* v. *Way*, ante p. 13. and cases cited in note there.

Case 40.
Eq. Ca. Ab. 62, pl. 3. 324. pl. 2. S. C.
2 Ch. Ca. 98.

RAYSON *versus* SACHEVEREL.

Baron and *Feme* levy a fine of the wife's land, to enable them to take up the sum of 400*l*. They borrow this money,

Baron and *Feme* by deed and fine mortgage the wife's land for 400*l*. the husband pays in part of the principal, and afterwards borrows the same sum again of the mortgagee.

and make a mortgage for it; and after the mortgage is forfeited, the husband pays in part of the mortgage money; but afterwards borrows as much money more of the mortgagee, as he had paid in before.

It was decreed, that the mortgagee having the estate in law in him by the forfeiture of the mortgage, he should hold the land against the heir of the wife, until the whole money was paid; and if the heir would not pay in the whole principal, interest and costs, he should be foreclosed. (1)

Decreed the heir of the wife should not redeem without paying off both sums.

(1) It appears that an indorsement was made on the mortgage deed, and subscribed by *Baron* and *feme*, whereby they agreed that the land should stand charged with the money, and that the wife, with the consent of the husband and other parties interested made a will, and devised the lands in question to her daughter, and her heirs to be sold for the payment of her debts, and the plaintiff's debt in particular, Reg. Lib. 1681, B. fol. 409, vide *Brend* v. *Brend*, post 213, et vide *Anon.* Mos. 248., where on mortgage by husband and wife of lands purchased to the use of them and their heirs, without a fine, and bill in equity to foreclose and joint answer, and then husband dies, the joint answer of husband and wife held equal to a fine.

PENN *versus* CHETLE.

Case 41.

THE Commissioners for the taking of an answer in the country had omitted to indorse the writ, *executio istius brevis*, (1) &c. For this irregularity in the returning of the answer, they had got the answer referred to the six clerks; but upon motion to the *Lord Chancellor*, forasmuch as the Commissioners had indorsed on the answer *capt' et jurat' &c. secundum effectum et tenorem commission' huic annex'*, and had annexed the commission to the answer, it was ordered the answer should be allowed.

Executio istius brevis, &c. omitted in the return of a commission to take an answer, supplied by other words in the return.

(1) For the form of this indorsement vide Harr. Ch. Prac. vol. 1. p. 219.

MALLET *and* TRIGG.

[42]

Case 42.

IT was denied by the *Lord Chancellor*, that the parson *de jure* has the nomination of the curate, and more especially where the parson is of a lay fee, as was the case in question, *viz.* a *Prebendary* had demised for *three* lives the corps of his prebend, which consisted of two impropriations, and so

A parson impropriate shall not have the nomination of the vicar.

MALLET *and* TRIGG.

now by the statute were become lay fee: (1) in the lease were as general words as was possible, and particularly that the said lessee should find two vicars for the aforesaid impropriations, and pay to one so much, and to another so much. But the *Lord Chancellor* said, that by finding, was meant maintaining only, and not electing and choosing; (2) and he said, there was a great difference as to the parson's right of naming or choosing his vicar, where the parson was of a lay fee, and where he had a cure of souls: for in the latter case there was reason he should approve of the man, who was to act under him in so high a trust. And the curate that came in by opposition to the lessee, was established by the *Lord Chancellor*, and the charity decreed to him.

Note,—This case came before the *Lord Chancellor*, upon exceptions to a decree of the Commissioners of Charitable Uses. (3) One exception was, that by the stat. of 29 of this King, (4) none but ecclesiastical persons could augment poor vicarages, so as to be established as a charitable use within that statute, and that the lessor in this case, who was only a prebendary, was not within that statute. *Sed non allocatur*. (5)

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(1) If the prebendary alien his whole possession, he continues prebendary for he has his stall in the choir, and his voice in the chapter, Dean and Chapter of *Norwich's* case, 3 Rep. 75 *b*. For it is a principle that he may not grant any thing that belongs to his spiritual function, *Sharrock* v. *Bourchier*, Sir Thomas Raym. Rep. 88.

(2) Vide *Bonsey* v. *Lee*, post 247. *Herbert* v. Dean and Chapter of *Westminster*, 1 P. Wms. 774. *Dixon* v. *Kershaw*, Amb. 528. [S. C. 2 Eden, 360. See also *Farnworth* v. *Chester*, 4 B. & C. 555.]

(3) Vide stat. 43 Eliz. c. 4. s. 10.

(4) Stat. 29 Car. 2. c. 8.

(5) The exceptions which are not particularly stated in the register's book were held to be frivolous and insufficient, and over-ruled accordingly, and the decree of Commissioners fully established, and the arrears to the time of that decree ordered to be paid by the exceptants to the respondents, and on making such payments and performances as therein mentioned, they were excused from costs, but in case the said exceptants should put the respondents to any further proceedings to enforce the performance of the said decree, then the court would consider of costs, Reg. Lib. 1681. B. fol. 476. *Note*,—It appears that no appeal lies to dom. proc. from a decree on the statute of charitable uses, *Saul* v. *Wilson*, post 2 vol. 118. *Warner* v. *North*, Show. P.C. 110. But notwithstanding a decree by Commissioners of charitable uses, the Court of Chancery may still permit a suit in the nature of an original suit to be instituted there for the same subject, in which new matter may be set forth, *Burford Corporation* v. *Lenthall*, 2 Atk. 551. As to the power of the court to give costs under the statute, vide *Burford Corporation* v. *Lenthall*, ub. sup. Where a special visitor is appointed there shall be no commission, under 43 Eliz. *Attorney-General* v. Governors of *Harrow School*, 2 Vez. 551., otherwise of a collateral trust or charity, ibid. It was doubted whether an appeal from a decree of the commissioners of charitable uses, may be heard at the rolls, *Rockley* v. *Kelly*, Pre. Ch.

111. But it seems that the appeal does not come before the *Lord Chancellor* either in his ordinary or extraordinary jurisdiction, but personally, Corporation of *Burford* v. *Lenthall*, 2 Atk. 552. Though the return of the commission is in the petty bag, which retains the proceedings, ibid.

MAN *versus* BALLET.

[43]

Case 43.

Eq. Ca. Ab. 99. pl. 4. S. C.

No agreement of the parishioners, where several charities are given for several purposes, can alter them, or divert them to other uses.

Upon exceptions to a decree by the commissioners for charitable uses, the chief matter insisted upon was this. Here were several distinct charities given to a parish, *viz.* such a farm worth 12*l.* *per ann.* for repairing the church, another farm worth 6*l.* *per ann.* for mending the highways, and so much to the poor, &c. in all 40*l.* *per ann.*

The complaint against the trustees of this charity was, that the church had been out of repair, and the rents of the said farm of 12*l.* a-year were not applied for the repairs of the said church, but a levy rate had been raised on the parishioners for such repairs.

The trustees reply, that what they wanted in weight, they had in measure. What was deficient as to the repairing of the church, was balanced and made amends for in the greatness and excess of the other charities, *viz.* towards the poor, and for the highways, &c. and that all these charities were entirely for the benefit of the parish, and no one person concerned in them more than another; and that therefore if they had not exactly pursued the precise original direction of the charity in its first institution, yet they having done nothing for any man's private advantage, but things only that were necessary, and parochial concerns, and in regard they had really and *bonâ fide* expended all the moneys they had received by virtue of this charity, they hoped *that* should excuse them for the time past; and the rather for that they had but trod in the steps of their fore-fathers; for that for above twenty years together this money had been promiscuously disposed of.

But the truth of the case fell out to be, that they had applied this money for the finding of a *lecturer*, and had allowed him 10*s.* a day, there not being then any one to officiate within the parish: and it was urged, that this was in ease of the whole parish, who otherwise must have found a minister, and so it was the same thing to them whether they paid their money for the church or minister.

MAN v. BALLET.

But the *Lord Chancellor* said, If it should be admitted that for parochial charities the parishioners might by agreement change and apply the charities, as they thought fit, it would be a great step towards destroying all charities; (1) and at this rate we should have all persons' charities given away to preaching ministers and lecturers; but they should not thus think *to rob Peter to pay Paul:* however forasmuch as this money for a long time had been thus promiscuously applied for the time past, they should not be punished for that misemployment in any thing, saving as to what was paid to the parson, for which they should not be allowed one farthing: and directed the account to be so taken.

Another exception was, that the commissioners of charitable uses by their decree had charged them with the rent of the premises for two years longer time, than in truth they had received it.

As to that the *Lord Chancellor* declared, that a trustee for a charitable use was not otherwise or further chargeable than any other trustee is, who is only to be charged for so much as he receives, and shall not stand charged for the receipts of others. (2)

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(1) Vide St. *John's Coll. Camb.* v. *Plott*, Finch. Rep. 222. If money be given for the relief of the poor, and it is laid out to build a conduit, this is a misemployment, Duke's Charit. Us. p. 94., et vide *Attorney-General* v. The *Margaret and Regius Professors in Camb.* post 55. *Phillips* v. Sir *John Walter*, 2 Bro. P. C. 198. 4 Vin. Ab. 494. pl. 14.

(2) But such trustee shall be chargeable in like manner with any other trustee, and no difference whether the trustee for a charitable use be a public company or private individual, for where a public company being trustees for a charity mismanaged the fund, and neglected the objects, they were decreed to make good the deficiency, and to pay the costs of the original suit, and 10*l.* costs of the appeal, *Attorney-General* v. *Haberdasher's Company*, 1 Bro. P. C. 9. It appears in the principal case that certain lands, time out of mind, had been employed, and ever since the 5th of Eliz. to the 13th year of his then Majesty had continued in feoffment and other conveyances in trust, for the use of the repair of the parish church, and no other use, and that by deeds of lease and release, 15th and 16th Jan. 13 Car. 2. the same, together with several other lands of the yearly rent of 17*l.* and all which had time out of mind been employed in particular uses, had been settled on the exceptants the trustees, promiscuously to dispose of the rents and profits of the whole to the repair of the church and other uses, for the ease and benefit of the parish, to which the same were never intended. This deed of lease and release decreed to be void by Commissioners of Charitable Uses, as a breach of trust, and that the surviving feoffees in a month after service of the said decree should execute a feoffment of the premises to persons therein named, and their heirs, in trust for the respective uses for which the same were respectively given and limited, time out of mind. And the decree of the court confirmed the decree of the commissioners, and as to the parson it directed that any money allowed or paid by the exceptants to any Minister should

Note.—Mr. *Attorney* in this case harped much upon it, that this *lecturer* was a *Presbyterian*, and as soon as he had done in the church would run into a *conventicle;* and upon his repeating this matter so very often, the *Lord Chancellor* told him, he was not to be led or harangued with prejudice into a cause. It was not before him in this cause, whether the man was a *Presbyterian* or not: he minded the matter only and not the man.

MAN v. BALLET.

be paid over again by them to the new trustees, together with interest thereon, from the respective times they received, and so misemployed the same and also interest on moneys received by them, for timber or otherwise, from the time they ought to have paid the same, Reg. Lib. 1681. B. fol. 464.

ANONIMOUS.

[45]

Case 44.

A MORTGAGEE shall not account according to the value of the land, viz. He shall not be bound by any proof that the land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so, had it not been for his wilful default: as if he turned out a sufficient tenant, that held it at so much rent, or refused to accept a sufficient tenant that would have given so much for it. (1)

Eq. Ca. Ab. 328, pl. 3. S. C.

Mortgagee shall not account for more than he actually receives, unless where he has been guilty of a wilful default; as if he has turned out or refused a sufficient tenant.

(1) In the case of *Moseley* v. *Elves*, Ca. in Chan. 107, which was the case of a mortgagee of an estate for life, it was decreed that mortgagee should be charged in account no more for the lands, held for life of mortgagor, than the master should really judge them to be worth, without respect to the benefit that had happened by the continuance of plaintiff's, the mortgagor's life, but on appeal this decree was reversed in Parliament, vide Duke of *Bucks* v. *Gayer*, post 258. *Chapman* v. *Tanner*, post 267. *Coppring* v. *Cooke*, post 270. *Bentham* v. *Haincourt*, Pre. Ch. 30. Vide also the other cases in Vin. Ab. Tit. Mort. W. 472.

NEWMAN *versus* JOHNSON.

Case 45.

A MAN seized of copyhold lands surrenders them to the use of his will, and then by his will says, viz. *my debts and legacies being first deducted, I devise all my estate both real*

Eq. Ca. Ab. 197. pl. 1. S. C.

My debts and legacies being first deducted, I devise all my estate real and personal to *J. S.* This amounts to a devise to sell for payment of debts.

ANONIMOUS. *and personal to J. S.* And held by the *Lord Chancellor*, that this should amount unto a devise to sell for the payment of his debts. (1)

In this case it was said by Mr. *Solicitor General*, that a parol declaration is sufficient to subject lands to the payment of debts, where a man has but an equity only. (2)

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(1) Vide *Elliot* v. *Merriman*, Barnardist. Rep. 78. The words "my "debts being first satisfied; or I will "that all my debts be justly paid," were formerly held to constitute a charge of debts, on the real as well as personal estate, vide *Trott* v. *Vernon*, Pre. Ch. 430, post 2 vol. 708. *Clowdesley* v. *Pelham*, post 411. *Bowdler* v. *Smith*, Pre. Ch. 264. *Harris* v. *Ingledew*, 3 P. Wms. 91, and cases cited in note there, but for the present state of the law on the subject vide the cases cited in note to *Clowdesley* v. *Pelham*, ub. sup. [See also *Powell* v. *Robins*, 7 Ves. 209. *Noel* v. *Weston*, 2 V. & B. 269. *Clifford* v. *Lewis*, 6 Madd. 33, (where all the modern cases on this subject are collected) *Sanderson* v. *Wharton*, 8 Price, 680.]

(2) *Quære autem.* Whether this may be done since the statute of frauds?

Case 46.

JONES *versus* PUREFOY.

By a proviso in a marriage settlement the deed was to be void, if the marriage was not had in *ten* months.

JONES having a demand on *Purefoy's* estate, as a creditor for money borrowed by *Purefoy's* father, and secured by mortgage on this estate, *Purefoy* sets up a marriage settlement, some time precedent to the mortgage, to defeat it.

The heir sets up this settlement to defeat a mortgage made by his father, after his father had sworn that he was not married within the *ten* months.

The case was thus, in 1672 *Purefoy's* grandfather being seized of the estate in question makes this settlement* on his grandson; but in the deed there is this proviso, viz. that in case the marriage did not take effect within *ten* months then next ensuing, then all the limitations and uses in that deed should cease and be void. Afterwards in 1674 *Purefoy* the father borrows money on this estate, and in his answer swears, that this estate is not any wise incumbered, for that the marriage did not take effect within the *ten* months: and now the grandson sets up this deed of settlement; and in the replication the plaintiff disclosed this special matter, *viz.* that *Purefoy* the father was not married within the *ten* months according to the proviso in the deed.

[*46]

The *Lord Chancellor* on the hearing having decreed it against the defendant *Purefoy*, as well for that his father's oath was so strong against him, as also for that *Purefoy* could not make it appear that his father was married within the *ten* months by the deed appointed:

The defendant upon a petition obtained a rehearing, suggesting that the special matter disclosed in the replication came not in within time, so as to be examined to, and put in issue, and now the defendant had discovered full and strong proof; but he could obtain no relief on the rehearing.

Voluntary settlement made by the father is fraudulent as to any mortgage made by himself. Otherwise as to a mortgage made by the son.

1*st*. It was objected by the plaintiff, that this settlement was but a voluntary settlement, and therefore could never prevail against a purchaser, and that without notice: but as to that objection, they gave this clear answer. It was true, it was a voluntary settlement; and if it had been made by the person that mortgaged these lands, it should never prevail against a purchaser; but here the settlement was made by the grandfather, and the estate passed from him; but the mortgage was made by the father, who was never seized nor possessed of the estate.

[47]

It was then insisted on the behalf of the defendant, that the replication in which this special matter was disclosed, came not in time, and so was not properly in issue; and therefore the defendant having now sufficient proof to maintain that his father was married within the *ten* months, *that* proof ought to be received: and they produced the *parson* that married them, who was ready to swear, that he marrid them within the *ten* months, and that the register book of the church, by which this matter should have been properly proved, was lost. And they produced a printed book supposed to be printed just upon the marriage of the defendant's father, in which, amongst other things, was contained an *epithalamium* (which Mr. *Phillips* called an *elegy*) two strong lines whereof were, viz.

And every day of the year shall be to you
The fifth of Jan. *one thousand six hundred and seventy-two.*

Which they would make use of as an argument, that the defendant's father was married in 1672. But on the other side they maintained that the replication came in within time; and therefore no new proof could be admitted.

The *Lord Chancellor* took notice of what dangerous consequence it would be; that if after publication passed, and people seeing where a cause pinched, they should then be at liberty to look out witnesses to bolster up the faulty part of the cause, the necessary consequence would be perjury: (1)

(1) After publication passed and examination known, the court will not in general, give either side leave to examine, *Cann* v. *Cann*, 1 P. Wms.

JONES v. PUREFOY.

Where a creditor can, even by the strictest rules of the court, get any advantage, he shall not be deprived of it.

and he declared where a man had a just debt due and owing to him (as this was of all hands admitted to be) if such a man could in any case, even by the strictest and most precise rules of the court, get any advantage of an heir, &c. he would never be instrumental in depriving him of that advantage: and therefore he confirmed his former decree, and established the mortgage.

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And *Purefoy*'s counsel having pressed the case of what pernicious consequence it would be to their client, there being divers other creditors, and that the debts would nigh swallow up the whole estate; the *Lord Chancellor* said, the other creditors would not have altogether so great an advantage, as Mr. *Jones* now had, by reason of the forms of the court; yet even as to them, when they should come into *Chancery*, the defendant *Purefoy* would have a very difficult defence, when he went about to perjure his own father in a court of equity by the evidence of the *parson* and the *epithalamium*. (1)

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727. *Smith* v. *Turner*, 3 P. Wms. 413. *Bacon's* Tracts, 293. But by a special order on good cause being shewn, and affidavit that the party nor any to his knowledge have seen or been informed of, or will see or be informed of, the depositions, such examination may be had, Wyat. Pra. Reg. 193. [*Whitelocke* v. *Baker*, 13 Ves. 512.] Nor will the court allow the question of competency to be examined after publication, though it will the question of credit, *Callaghan* v. *Rochfort*, 3 Atk. 643, et vide *Harvey* v. *Montague*, post 126. *Hastings* v. *Gregory*, in the Exchequer. 19 Nov. 1782. *Sanderson* v. *Thwaites*, in Chan. Trin. 1782, cited Mitf. Tr. 262. (3d edit.) [*Purcell* v. *Macnamara*, 8 Ves. 324. *Wood* v. *Hamerton*, 9 Ves. 145.]

(1) This case is rather confusedly stated in the Register's Book, but as well as it can be made out it appears to be as follows: *George Purefoy*, the defendant's father, by a settlement made on his marriage in February, 1652, was entitled to an estate for life only, according to the answer in the manors of *Wadley* and *Wickensham*, and afterwards became indebted to the plaintiff in the sum of 2,000*l.* and being so indebted he some time in the month of February, 1662, made a mortgage to the plaintiff of part of the said manors of *Wadley* and *Wickensham*, of which he is stated in the bill to be possessed for a long term of years, for securing the repayment thereof, and in which *Knightley Purefoy*, one of the defendants, and the younger son of the said *George Purefoy* joined, and which became forfeited. *Purefoy*, the father, wanting more money, the plaintiff agreed to surrender up his mortgage, and did so, and in lieu thereof in Dec. 1666, took a statute from *Purefoy*, the father, for the said 2,000*l.* and afterwards borrowed money of one *Babor*, who exhibiting his bill against the *Purefoys*, to discover incumbrances, *George* and *Knightley Purefoy* by their answer swore, that *George Purefoy* was the owner of the said manors, and that they were free from all incumbrances, except the plaintiff's said statute, and some other mortgages therein mentioned, to the amount in the whole of 7,000*l.* which *Babor*, it was then agreed, was to pay and to have the securities assigned to him, it then appears that the plaintiff

received 1,000*l.* in part of his debt and that before any further payment to him, viz. in the month of December, 1670, *Purefoy*, the father, died intestate, leaving the defendant *Henry Purefoy* his son and heir, who entered and also took out administration to his father. It appears by the answer of *Henry Purefoy*, that in pursuance of an agreement between *Purefoy*, the father, and his wife, a settlement of the manor of *Fenney Drayton*, and other manors and lands being their freehold and inheritance was made to trustees for payment of debts mentioned in a schedule annexed to the said deed, as therein mentioned, and that the debt claimed by the plaintiff was none of the schedule debts. *Babor*, who was made a defendant, by his answer set forth his mortgage, and that he before the making thereof had no notice of the plaintiff's said statute, and the decree thereon, as to the plaintiff, was, that he should be admitted to the redemption of *Babor's* mortgage, for the satisfaction of his debt, Reg. Lib. 1681. A. fol. 830. There was afterwards a re-hearing, the entry of which after stating according to the entry of fol. 830, and particularly that the counsel for the defendant had insisted on the settlement of 1652, is *int. al.* in the following words "But there being a "proviso in that deed (i. e. the deed "of 1652, and not the settlement of "1672,) that if that marriage should "not take effect before the 1st of May "then next, *and the plaintiff reading "the deposition of one *Blagrave* that "he believed the said marriage was "not had till after, wherein the de- "fendant Sir *Henry*, was surprised, as "not having examined to that point, "the court was pleased to let the plain- "tiff in for a satisfaction of his said "debt, but without costs, so as the "principal and interest were paid the "26th of this instant May, wherefore "and inasmuch as the cause turned "wholly upon that point, although "no notice is taken thereof in the "last order, which matter the de- "fendant Sir *Henry Purefoy*, by Dr. "*Hinckley*, who married his father "and mother, and several other persons "of good quality now present in court "were able fully to prove, that the said "marriage was on the 22d February, "1652, and so within the time of the "proviso, the said defendant's counsel "did now pray that the said Dr. "*Hinckley*, and the said other wit- "nesses may be examined *vivâ voce*, "to prove the time of the said mar- "riage and marriage settlement, it be- "ing of so great consequence to the "defendant, in relation to the other "creditors as well as the plaintiff. "But his Lordship declared he would "not now admit of any evidence *vivâ "voce* to prove the time of the said "marriage, and confirmed his former "order, enlarging the time of pay- "ment to the 26th of the then next "month, and on payment thereof "5*l.* costs of the day and no further "costs." Reg. Lib. 1681. A. fol. 936.

* It is thus in the register's book.

GOILMERE *versus* BATTISON.

Case 47.

Eq. Ca. Ab. 17. pl. 4. S. C.

An agreement by feme, when sole, that if she die without issue, she would leave *J. S.* 500*l.* or the land.

THE heir at law pretending a right to the land in question, came to the tenant in possession, who likewise claimed an interest in the fee, and threatening to evict her at law, she makes this promise, viz. *If I die without issue of my body,*

Decreed the agreement to be performed against the husband, who was devisee of the wife.

GOILMERE v. BATTISON.

I will either give you 500*l. or leave you my land:* and now she being dead, and having devised her land to her second husband, (1) who had never any notice of this former agreement, a bill was brought to have an execution of this agreement.

It was insisted, that this was all the portion her husband had with her, and therefore he was *quasi* a purchaser: and that a remainder after an estate tail is so remote, that such an agreement should never be executed in equity: for if the wife had really by deed executed settled the estate to the use of herself in tail, remainder in fee to the plaintiff, yet she might at any time have docked that remainder by a common recovery.

But the counsel on the other side insisted that an agreement for such a remainder should be executed in equity, and that the plaintiff could in no sort be called a purchaser: and

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(1) *Quære.* If a feme covert be seized of lands in fee, she cannot devise the same to her husband, because at the making of the will she had no power (being *sub potestate viri*) to devise the same, and the law intendeth it should be done by coercion of her husband, Co. Litt. 112 b. Et vide stat. 34 & 35 Hen. 8. cap. 5. So *George* v. ——, Amb. 628. Nor can a wife change the nature of her estate by articles, *Oldham* v. *Hughes*, 2 Atk. 452. Et vide *Milnes* v. *Busk*, 2 Ves. jun. 488. But the fact in this case does not appear to be so. The case as stated in the Register's Book is as follows: *Thomas Goilmere*, the plaintiff's brother, being seized of certain premises, and having no children, and being desirous that a marriage might be concluded between plaintiff and one *Eliz. Wells*, which was then in treaty, the said *Thomas* did, by deed, bearing date 2d Nov. 1653, on consideration of said marriage, she being worth eight score pounds, bind his heirs and executors if he died without issue, to give them 300*l.* or all his freehold lands at *Foxall* and *Brithwell*, to them and their heirs. That the marriage was soon after had, and the plaintiff had above eight score pounds portion with her, and the said *Thomas* died several years after without issue, but did not give the 300*l.* or any thing to plaintiff, and charged that defendant kept the lands, &c. The defendant by answer admitted, that *Thomas Goilmere* was seized of the premises but did not know of any writing entered into by the said *Thomas*, but stated that the said *Thomas*, by deed of feoffment, dated 19th Oct. 1661, on his marriage intended to be had with *Mary Smith*, settled the aforesaid premises to the use of himself till the marriage, and after to them two for their lives, and then to his heirs, and that he made his will, dated 24th Oct. 1667, and devised all his freehold lands to *Mary*, his wife, and her heirs, who being seized thereof made her will, and devised the same to the defendant *Judith*, the wife of the defendant *Philip Battison*, whereupon and upon hearing the proofs in the cause it was decreed that the defendant should forthwith deliver up the possession, and execute a good conveyance of the said premises to the plaintiff and his heirs, and also deliver up all writings concerning the same, but the defendants were to have all the arrears of rent then due for the said premises. Reg. Lib. 1681. A. fol. 751.

cited the case of Serjeant *Maynard* versus *Mosely*, where such an agreement after an estate tail was decreed.

The *Lord Chancellor* decreed the agreement to be executed.

GOILMERE v. BATTISON. [49] 1 Ch. Rep. 253.

DARCY *versus* HALL.

Case 48.

WHERE an heir or trustee buys in an incumbrance, he shall be allowed no more, than what he really pays for it; (1) unless he bought it to protect an incumbrance to which he himself is intitled: but where a stranger that has an incumbrance upon an estate buys in another security to protect his own, he shall not only hold it till he is satisfied his own debt and has reimbursed himself the money paid for the incumbrance he bought in, but even till he has received all the money and arrears of interest due on the security he so bought in. And in this case, though it was an heir that bought in an incumbrance (there being some special circumstances in the case) (2) he was allowed on account the whole money due on the incumbrance he bought in, though he paid less for it.

Where a mortgagee buys in an incumbrance, he shall be allowed all that is due on it, tho' he bought it in for less. Otherwise, if an heir or trustee buys in an incumbrance.

(1) *Brathwaite* v. *Brathwaite*, post 335. *Long* v. *Clopton*, post 464, and cases cited in note there.

(2) The circumstances to be collected from the register's book are as follows: *Sanders*, under whom the defendant claimed, being indebted to one *Rogers* in 1,200*l.* agreed in consideration thereof, to grant to him an annuity of 120*l.* for 21 years from July 1639, and entered into a statute to secure the same, and the annuity was by deed charged on certain lands therein mentioned; it appears that *Sanders* paid the annuity till Michaelmas, 1641, and that half a-year being due on Lady-day, 1642, *Rogers* entered, but *Sanders* was relieved on bill filed, and payment of the arrears, and continued to pay the annuity till his death, in 1644; after his death *Rogers* entered and received the profits, and cut down wood more than sufficient to pay the 1,200*l.* and interest. In 1653 one Lady *Brett* claiming an estate for life in the premises, and bringing ejectment against *Rogers*, they came to an agreement, whereby the said *Rogers* agreed to pay her 125*l.* costs, and 50*l per annum*, during her life, and that the overplus of the rent above the 50*l. per annum*, and the 125*l.* and interest, should go in satisfaction of the annuity of 120*l.* by which agreement and an extent therein mentioned, the bill alleged that the said ——— *(here the name is left out)* had received sufficient to satisfy the said 125*l.* and interest, and also the said annuity of 120*l. per annum*, for the 21 years, and afterwards in 1655 conveyed the premises as therein mentioned with the defendant's privity, but certain disputes arising between the parties an agreement was entered into among them by which it was agreed on all hands that the statute was satisfied out of the arrears in the tenants' hands, and then states that certain persons, whom the plaintiffs represented having become bound for the said *Sanders* in his life time, and

becoming creditors of him for several sums of money lent to him by them, he by deed in 1641 mortgaged to, &c. the manor of *Sysam*, part of the premises in question, for securing the re-payment thereof; in which deed, and also in another executed by *Sanders* soon afterwards, a proviso was contained that if *Sanders* did not pay certain debts, and indemnify them who were so bound for him on the day, and as therein mentioned, then that they, the mortgagees, might sell the premises, and out of the money to arise by sale and the intermediate profits to retain all such sums of money as they should disburse or lay out in freeing the premises from any charges touching the said debts and premises, with interest, and out of the residue of the money pay certain scheduled debts, and it was agreed that *Sanders* and his heirs should, upon request, join in sale of the premises, and that the surplus of the lands or money should be conveyed or paid to *Sanders*, or as he should appoint. The bill then states that the mother of *Sanders* died in 1662, and that *Rogers* thereupon extended *Sysam*, and received the profits thereof, being 150*l.* *per annum*, by which the said statute was over-paid. The plaintiffs then claim to be entitled to *Sysam*, or to be paid or indemnified thereout, as therein mentioned, but that the defendant had got possession, and claimed to be entitled thereto, as heir of the said *Sanders*. And then the bill prays an account, and that satisfaction may be entered upon the said statute, or that the same may be assigned for the benefit of plaintiffs. The answer admits the facts up to the agreement with Lady *Brett*, but it denies that by that agreement the overplus above the 50*l.* *per annum* should go towards satisfaction of the 120*l.* *per annum*, and that as to the other matters in the bill they ought not to be further questioned, it then states that *Rogers*, by direction of defendants, conveyed all his right to the extent on *Sysam* in trust for defendant, under which assignment they make title to *Sysam* lands extended until they shall be paid the arrears of the annuity of 120*l.* which shall be found due, and are willing to account. It was then insisted on the part of the plaintiff that the defendants were heirs or claiming under the heirs of *Sanders*, the cognizor of the said statute, and having no incumbrance on the said estate, and buying in the said statute for little or nothing, they ought to be allowed no more than what they paid for the purchase thereof to *Rogers*. This is the whole of the material part of the statement of the case in the register's book; the decree is as follows: "Whereupon, &c. this court doth order that the said parties proceed to "an account before the *Master*, who "is to see what is due to the defend- "ants, in relation to the said annuity "of 120*l.* granted to the said *Rogers*, "*and interest for the same*, from the "respective times the same ought to "have been paid, applying towards "satisfaction thereof what the said "*Rogers*, or any under him, or to the "use of him or those claiming under "him have or without their wilful de- "fault might have received out of "*Chillington*, part of the premises in "the pleadings mentioned before 1655, "and also out of *Sysam*, and what the "*Master* shall certify due to the de- "fendant thereon the plaintiffs are to "pay, together with the costs at law, "which the said *Rogers*, or the defend- "ants, have expended in the defence "of the title or otherwise, by reason "of the said securities, and that there- "upon the defendants shall vacate the "said statute, or assign over to the "plaintiff, or as he shall direct, the "said securities and extended pre- "mises in *Sysam*." Reg. Lib. 1681. A. fol. 491.

The Earl of HUNTINGTON *versus* GREENVILLE. Case 49.

Assignee of a statute purchases the estate, having notice of a second statute. How far he shall make use of the first statute to protect his purchase.

THE case was thus. One Mr. *Lewis* being seised of the lands in question on which there were two several statutes, amongst other incumbrances: the prior of the said statutes, which was a statute for 1,000*l.* was bought in by the Earl of *Huntington* for 300*l.* it having been formerly extended, and then but 300*l.* remaining due upon it. The next statute was for a great sum of money, and belonged to the defendant; and it was alleged, that the plaintiff had notice of the defendant's statute, and was once in treaty about buying it in. Two years after the plaintiff had bought in the first statute, he purchases the lands in question: and afterwards the defendant having notice of the statute that was assigned to the Lord *Huntington*, endeavours, as was alleged, to get some of the next of kin to the conusee of the first statute to take out letters of administration *de bonis non* of the said conusee of that statute, to the intent that the defendant might bring a *scire fac' ad computandum* against them to come to an account with him upon the first statute, and pay them off what should be due, if any thing, and to have the said first statute vacated, that so he might be let in upon his security: but they declining to accept of such administration, he himself took out letters of administration *de bonis non* of the said conusee, and procured the officer in the *Petty Bag* to vacate the said statute: and now the Lord *Huntington* exhibited his bill to be relieved against the undue vacating of this statute. [50]

It was observed, that where a statute is extended, it cannot be tried in an ejectment, whether it be satisfied or not; but the only remedy is by a *scire fac' ad computandum*, or Bill in *Chancery;* (1) but where land is extended upon an *elegit*, the debt and yearly value appear on record, and it may be well known when the debt is paid, and may come in evidence upon a trial, in an ejectment.

(1) [See note 6 to *Underhill* v. *Devereux*, 2 Wms.'s Sanders 72 *u.* (5th ed.) see also *Price* v. *Varney*, 3 B. & C. 733.] If the conusor will sue the conusee in a court of equity, he shall bring him to account for what he hath received of the profits above the extended value, but if a subsequent mortgagee buys in a preceding statute, the prior mortgagee shall not bring him to account for what he has received above the extended value, unless he, the subsequent mortgagee, has received enough to satisfy his own mortgage, as well as the statute he has so bought in, *Marsh* v. *Lee*, 2 Vent. 338. [*Brace* v. *Marlborough*, 2 P. Wms. 492.]

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Secondly, It was observed by Mr. Serjeant *Maynard*, that the plaintiff's counsel had much mistaken the law in what they affirmed: for the law was clear and certain, that where a statute is once extended, there, though the conusee afterwards assign the same, yet nevertheless the conusee himself, his executors or administrators, may release or discharge such statute, and it shall be good and binding in law.

Thirdly, He said, there was a great difference where a man was first a real purchaser without notice, and then finding incumbrances to arise upon his estate, there, when he was fast and once in, it was lawful for him to get in what ancient securities he could to corroborate and protect his purchase: but this is quite another case, for here the plaintiff had bought in this statute at least two years before his
[51] purchase, and so it could not be said to be done for the protection of his purchase: and insisted, that in this case the Lord *Huntington* ought not to be looked upon as a purchaser, having before his purchase notice of the defendant's statute; and that a man having a real debt might well secure himself by getting the statute thus vacated, and that being once done, this court ought not to take from him the advantage he had in law.

But it was then insisted by the Lord *Huntington's* counsel, that the defendant ought not to profit by the art and skill he had used in getting this statute vacated, the same being unduly done, and not according to the course of law, which should have been done regularly by a *scire fac' ad computandum;* and the defendant having intruded himself into an administration, to which he had no colour of right, on purpose to defraud the plaintiff, it ought not to avail him; and if he had been a fair and rightful administrator, yet his intestate under whom he comes in, having assigned the first statute for a valuable consideration, though the administrator might have a power of releasing or discharging it in law, yet he was but as a trustee for the assignee, and must be answerable to him for the breach of trust.

And the plaintiff's counsel insisted that they ought to have a perpetual injunction to quiet them in the possession: but the defendant's counsel insisted, that this court ought not to interpose and abridge him of the advantage he had at law, he being a real and true creditor.

Conusee of a statute having extended the land, assigns to *J. S.* and dies. One that had a second statute, gets administration, and acknowledges satisfaction on the first statute.

Lord Chancellor declared, that each of their demands were over rigid. And first he declared that the defendant should

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not profit by this vacating of the statute, but that the plaintiff should be restored and put in the same plight, as if this statute was still in force. But then the plaintiff must go to an account upon this statute, and if it was already satisfied, or the defendant would pay what should remain due thereupon, then the defendant must be let in.

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Mr. *Bows* of counsel for the plaintiff urged, that this statute should lie as a perpetual cover and fence to this estate, and that all the profits of the estate received since the purchase should be taken to be received as a purchaser only, and not be applied towards satisfaction of this statute: and the rather, for that although the statute was once extended, yet the plaintiff had not possession by virtue of this statute, but by reason of his purchase.

Equity will relieve against this practice, and put the assignee in the same plight, as if the statute was still in force.

But that was utterly denied by the *Lord Chancellor*, for that no purchaser should be further or longer protected by an incumbrance bought in, than till such time only as he had received so much of the profits as would satisfy that security, and that then the same should be avoided by a *scire fac' ad computandum*, or by an account to be taken in this court: and his *Lordship* was of opinion, that although the statute in this case was bought in before the purchase, yet that made no difference in the case, but was as good, as if it had been bought in afterwards to protect the purchase, and therefore the Lord *Huntington* should be looked upon as a purchaser, having such security to protect his purchase: and the favour that this court allows to such a purchaser is, that he shall account only according to the extended value, and not according to the real value of the estate. (1)

The counsel for the plaintiff seeming dissatisfied with this direction, the *Lord Chancellor* told them, if all had been said as might have been said in this case, it would not have fared so well with them; for it would be a precedent of very mischievous consequence, that a man having bought in a prior incumbrance, and having notice of a subsequent statute, should then purchase the land with this notice, and yet have any protection or favour shewn him in it; and put them in mind of Sir *John Fagg's* case, (2) which the de-

(1) But by bill in equity the conusor shall compel the conusee to account according to the real value by him received, *Marsh* v. *Lee*, 2 Vent. 338. *Audley* v. ———, Hard. 136. Com. Dig. vol. 6. Tit. Stat. Staple. (G), and for further learning, and the cases on this subject, vide *Powell's* Law of Mort. (3d ed.) vol. 1. 422. *et seq.*

(2) Eq. Ca. Ab. 354. pl. 1.

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fendant's counsel could not remember to urge, where he being a purchaser came into a man's study, and there laid hands on a *statute, that would have fallen on his estate, and put it up in his pocket; and in that case, he having thereby obtained an advantage in law, though so unfairly and by so ill a practice, the court would not take that advantage from him.

Case 50.

Eq. Ca. Ab. 67. pl. 4.
2 Ch. Ca. 102. S. C.

MILDMAY *versus* MILDMAY.

A man's answer in the spiritual court may be read against him in this court. *Vide* 2 Roll. Abr. 670.

IN this case the answer of the defendant in the spiritual court being offered in evidence against him here, it was opposed by Mr. Serjeant *Maynard;* but Mr. *Solicitor-General* made answer, that it was true, depositions against a man in the spiritual court should not be made use of here without some special order for that purpose; but a man's own answer upon oath, let it be taken where it will, though it were a voluntary oath before a Justice of the Peace, shall be read against him here. Mr. Serjeant *Maynard* replied, they ought then to have given them notice of it.

How far equity will aid a wife to recover an annuity settled by the husband for her separate use, after an elopement and an offer of the husband to cohabit with her.

In this case the defendant having settled 50*l. per ann.* in trust for his wife, she afterwards obtained a sentence in the spiritual court to be divorced from her husband *a mensa et thoro,* wherein reciting that her husband had already settled 50*l. per ann.* on her, the said court adjudged to her 50*l. per ann.* more for *alimony;* and now she exhibited her bill in Chancery, suggesting that her husband had, on purpose to defraud her of this rent, procured the tenants to surrender their estates, on which the said rent was reserved, &c. And therefore prayed this rent might be made good to her by the decree of this court. (1)

But the defendant's counsel insisting, that this settlement of the said rent was only in trust for the husband, and in the deed there was not any trust declared for the wife, and that

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in truth she was a very lewd woman and had eloped from her husband; and he offering to take her again in his answer, *Lord Chancellor* would make no order in it, but only that the defendant should stand in the place of the tenants, and should admit the rents payable by the tenants to be still in

(1) Vide *Sidney* v. *Sidney,* 3 P. Wms. 269.

being, and then she might proceed at law and recover the rents there if she could. (1)

MILDMAY v. MILDMAY.

(1) In the Register's book an order is entered that the Registers of the Arches Court of *Canterbury*, should attend at the hearing with proceedings and sentence of divorce in that court, Reg. Lib. 1681. B. fol. 372. So order made on ecclesiastical officer in the case of a will, *Hodson* v. ——, 6 Ves. 135. and cases there cited. In cases where no agreement, this court will not allow maintenance to the wife, eloping and living in adultery, *Moore & Movre*, 1 Atk. Rep. 276. *Watkins* v. *Watkins*, 2 Atk. 97. Nor assist her in recovering her separate property, *Lee* v. *Lee*, Dick. 321. 806. But the relief for the husband must arise from a very plain case, (e. g.) where there is a criminal conversation plainly proved and plainly put in issue, *Moore & Moore*, ub. sup. There are instances, where, notwithstanding an absolute decree for a separate maintenance, yet afterwards upon the circumstance of the husband consenting to cohabit with the wife, and promising to use her kindly, the court has refused to continue the separate maintenance, *Head* v. *Head*, 3 Atk. Rep. 296. Vide also *Ball* v. *Montgomery*, 4 Bro. Ch. Rep. 339. 2 Ves. jun. 191. *Carr* v. *Eastabrooke*, 4 Ves. 146.

The KING *versus* CAREW.

Case 51.

The court of *Chancery* has admiral jurisdiction. Letters of *reprisal* may be repealed in *Chancery* after a peace, though there is a clause in the letters patent, that no treaty of peace shall prejudice them.

THE case was, that the defendant *Carew* as executor to *J. S.* being intitled to letters of *reprisal*, that were granted by the king to the defendant's testator for a great sum of money, (in which letters patent was a clause that no treaty of peace should prejudice them,) and the king having by several treaties of the peace with the *Dutch* expressly articled, that they should not be prejudiced by these letters patent; the question was, whether the king could by any treaty of peace *amortize* these letters patent, and so deprive the party of the interest that was thereby vested in him.

Mr. *Wallop* of counsel with the defendant insisted on time to argue it, being a weighty point that might well bear a great debate.

But the *Lord Chancellor* would not hear of it, saying, that the *Dutch* ambassador never came into the king's presence, but he was making fresh complaints; and that it was a case for which there could be nothing said, and that the case was very proper in *Chancery* for the repealing of these letters patent; for though the bar were not so well apprised of it, yet the *Chancery* had admiral jurisdiction by the statute of 31 *H.* 6. Num. 66 or 68, which was never printed. (1) And

(1) [Since printed. 31 H. 6. c. 4. Ruffhead's Statutes at Large.]

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in proof that a treaty of peace might revoke and *amortize* letters of *reprisal*, his *lordship* said the same might be done by a truce or by letters of safe conduct, and *a fortiori* by a treaty of peace: and that it might be done by letters of safe conduct he cited the statute of 11 *H.* 4. *Rot.* 66, and a judgment of the like nature given in the parliament of *England*, 2 *H.* 5. Num. 34. And for an authority that a truce had the like effect upon letters of *reprisal*, he cited the roll of parliament 10 *H.* 6. Num. 34, where the *Danes* after a truce made with them had seized *English* ships by colour of letters of *reprisal*, there being no provision made against them in the truce, and the parliament there petitioned the king for letters of *mart* against the *Danes*. (1)

Vid. post Case 116.

(1) Et vide Lord *Rockingham* v. *Oxenden*, Pre. Ch. 240., where it appears that this court has a concurrent jurisdiction with the Admiralty, and other courts peculiar to their jurisdiction. So an information entertained for setting aside letters patent obtained by fraud, *Attorney-General* v. *Vernon & Others*, post 277. 370. And the *Lord Chancellor*, it seems, by his ordinary power, is enabled generally to hold plea of *sci. fac.* to repeal the king's letters patent, vide 4 Inst. 80. 88.

Case 52.

The ATTORNEY-GENERAL on the behalf of PETER HOUSE COLLEGE in Cambridge, &c. *against* the MARGARET and REGIUS PROFESSORS in Cambridge, &c.

Eq. Ca. Ab. 99. pl. 5.

Court refused to mitigate or alter the terms, on which a lectureship for reading in *polemical* or *casuistical* divinity in *Cambridge*, was founded.

THE case was, a man having devised 50*l. per ann.* for a lecturer in *polemical* or *casuistical* divinity, so as he was a batchelor or doctor in divinity, and *fifty* years of age, and would read five lectures every term, and at the end of every term would deliver fair copies of the same to be kept in the university, and in default of such a lecturer, he gave that 50*l. per ann.* to ——— College in *Oxon.*

Now upon this information, the University of *Cambridge* with the consent of the heir at law would have had the rigour of the qualifications mitigated, *viz.* That a man of forty years of age might be made capable of this salary, and that *three* lectures every term might serve turn, and that if he delivered such fair copies of his lectures once a year it should be sufficient.

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But the *Lord Chancellor*, though no one made opposition to it, refused to intermeddle in it; and said they should be

held to the letter of the charity, and that the heir had no power to alter the disposition made by his ancestor. (1)

(1) The devise, as to certain lands being considered void, the defendant, *Anthony Knightsbridge*, the heir at law and administrator with the will annexed of the said testator, with a view to promote the design of the testator, did, by a deed duly executed, settle certain lands to the purposes of the said intended will. After taking notice that the said settlement might have its effect, as near as may be, according to the intents of the said testator's will, which it could not well have by the strictness of the penning of the will, without capacitating a lecturer of fewer years, and abridging the number of lectures termly, the decree, as stated in the Register's book as to this part of the testator's will, is as follows: "His "Lordship doth further order and de- "cree, by and with the consent of the "said *Anthony Knightsbridge*, as heir "and next of kin, and being the "founder of the said gift, having made "the settlement as aforesaid, to effect "the same, that the professor to be "chosen by the electors shall be Doc- "tor, or at least Batchelor in Divinity, "and capable, if he be of the age of "forty years or upwards, and that the "said lectures shall be reduced to *four* "in each term, instead of *five*, and that "such lectures shall be delivered in "writing to the *Vice-Chancellor* for "the time being, *once only* in every "year, *viz.* on the 20th of July, and if "the said lectures were neglected to "be read, then the rents of the pre- "mises to go according to the will." Reg. Lib. 1681. A. fol. 892. And that the manner and circumstances of a gift may be regulated by this court, *Attorney-General* v. *Combe*, 2 Ch. Ca. 18. *Watson* v. *Hinsworth Hospital*, post 2 vol. 596. *Attorney-General* v. *Smith*, post 2 vol. 746. *Attorney-General* v. *Whichcott*, Ch. Rep. 353. et vide *Attorney-General* v. *Hudson*, 1 P. Wms. 674. But where summary power given to the *Lord Chancellor* by private Act of Parliament, to vary the constitutions or provisions of a charity, *Lord Chancellor* refused to increase the number of trustees, or to diminish the number of the quorum, because, though his jurisdiction might extend to varying bye laws or particular provisions, it did not comprize a power to alter the general constitution of the trust itself, and therefore that the application must be to Parliament, *Ex parte Bolton School*, 2 Bro. Ch. Rep. 662.

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TERM. S. TRINITATIS, Case 53.

34 *Car. II.* 1682.

IN CURIA CANCELLARIÆ.

Sir THO. HARVEY *versus* RALPH MOUNTAGUE Ar'. Eq. Ca. Ab. 146. pl. 6, 163. pl. 2, 331. pl. 1. S. C.

THE case was thus. *Harvey* having by his will appointed the Lady *Harvey* and Sir *Thomas Harvey* executors: by a The defendant having notice of a decree, to which he was no party, pays money contrary to that decree. Ordered that he should pay the money over again. *Vid. post Case* 113.

HARVEY v. MOUNTAGUE.

former decree the Lady *Harvey* was to receive no more of the estate, and Sir *Thomas Harvey* to have a perpetual injunction against her, and a clause was inserted in the decretal order, that no creditor should pay her any more money.

The testator had a mortgage for 10,000*l.* on part of Mr. *Mountague's* estate. And Mr. *Mountague*, after notice of this decree (he being present at the hearing, &c.) but before any sequestration against the Lady *Harvey*, pays in this 10,000*l.* and interest to the Lady *Harvey*, and has his mortgage delivered up to be cancelled: and now a bill was brought against him by Sir *Thomas Harvey*, to compel a repayment of this money.

It was insisted, that it was a very hard demand in equity to have the same money twice paid, he having in this case paid it to a hand that by law was empowered to receive it, and to her who had his securities in her hand; and the no-
[58] tice that they pretend of the decree, is not any legal notice: but regularly he ought to have been made a party to the former suit, in which the Lady *Harvey* was decreed not to intermeddle with the estate, or at least to have been served with an order not to have paid the money to the Lady *Harvey*.

But on behalf of the plaintiff it was answered, that this was full notice to Mr. *Mountague*, and a pure voluntary payment in him on purpose to prevent and avoid the decree of this court. (1)

(1) Order confirming Master's report *nisi*. Reg. Lib. 1681. A. fol. 740.

Case 54.

BURDETT *versus* ROCKLEY.

A sequestration which issues as mesne process, determines by the death of the party. Otherwise, if it issues after a decree, though for a personal duty.

A SEQUESTRATION, that issues as mesne process of the court, will be discontinued, and determined by the death of the party: but where a sequestration issues in pursuance of a decree, and to compel the execution of it, there though the same be for a personal duty, it shall not be determined by the death of the party. (1)

(1) Sic dict. *Hawkins* v. *Crook*, 3 Atk. 593, sed vide contra *Bligh* v. Earl *Darnley*, 2 P. Wms. 622. *Wharam* v. *Broughton*, 1 Vez. 182. *White* v. *Hayward*, 2 Vez. 464. vide *University College* v. *Foxcroft*, post 166. [*Rowley* v. *Ridley*, 2 Dick. 626, and cases there cited.] As to the rise and pro-

It was objected, that it was but for a contempt that a sequestration issues, and that the principal intent thereof is to bring the party to a compliance, and not to levy the duty: though *that* be collaterally done.

Lord Chancellor, The sequestration binds from the very time of awarding the commission, and not only from the time of executing of it and its being laid on by the commissioners: for if that should be admitted, then the inferior officer would have *ligandi et non ligandi potestatem*. (1)

A sequestration binds from the time of awarding the commission, and not only from the time of executing it.

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gress of sequestration, vide *Hyde* v. *Petit*, 1 Ch. Ca. 91, and cases referred to in the margin there, and said sequestrators on mesne process, are accountable for all the profits, and can retain only so far as to satisfy for the contempts, *Gibson* v. *Scevington*, post 248. A *Serjeant at Arms* must return *non est inventus*, before a sequestration can issue, *Ex parte Jephson*, Pre. Ch. 549. And on a decree to account and sequestration had against the heir, it appearing that the heir had taken a new estate under a limitation by the father in pursuance of a power, the sequestration was discharged, *Anon.* 1 Ch. Ca. 241. But the sequestration does not go against the heir, until the suit is revived, unless the father's conveyance be pleaded, *Colston* v. *Gardner*, 2 Ch. Ca. 46. [S. C. from Lord *Nottingham's* MSS. 3 Swan. 279. *n.*] *Wharam* v. *Broughton*, ub. sup. And will extend to land copyholds and personalty, ibid. [But quære as to copyholds, *Carmarthen* v. *Hawson*, 3 Swan. 294. *n.*] As to the extent in which decrees are said to be equal to judgments at law, it is clearly laid down by the *Master of the Rolls* in *Bligh* v. Earl of *Darnley*, that they do not bind the real assets descended as a judgment does, and that it is only by process for contempt, that the lands can be bound. And as to decrees *quod computet*, they are but as interlocutory judgments at law, *Smith* v. *Haskins*, 2 Atk. 386.

(1) This was a bill against the widow and the daughter and heir of *Francis Rockley*, deceased, for an injunction to stay proceedings at law in ejectment brought by defendant on recovery in a writ of dower, to have the benefit of a sequestration granted by this court of all the estates real and personal of the said *Frances Rockley*, for satisfaction of the sums of 3,324*l.* 9*s.* 11½*d.* and 3,811*l.* 9*s.* 10*d.* decreed to be paid by him to the plaintiff, he having stood out all process of contempt. To this the defendant demurred, for that the decree was for a personal duty, and not for the lands in question, nor for any rent or maintenance of, or upon the same; and the sequestration being only for the contempt of the said *Francis Rockley* for disobeying the decree, was discharged by his death, he having died in 1678, and consequently the sequestration did abate, and the proceedings after his death were irregular, and the rather for that the decree was not revived after the death of the said *Francis Rockley*, and an order was thereupon made to revive against the personal representatives of *Rockley*, Reg. Lib. 1681. A. fol. 671. Afterwards in Michaelmas vacation the demurrer came on for judgment, and it appeared that after the death of *Rockley* the plaintiff renewed the commission of sequestration by order of the court, and an injunction was awarded to establish the commissioners in possession, and accordingly possession was obtained. The court allowed the demurrer, and the injunction which had been granted in this cause for stay of defendant's proceedings at law dissolved, and the rather for that after the death of *Rockley* no subpœna in nature of *scire facias* had issued against the defendant the heir, Reg. Lib. 1682. A. fol. 184.

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Case 55.

STRODE *versus* LITTLE.

Eq. Ca. Ab. 38. pl. 7.

Bill for an account of the profits of *Mendip* mines. Defendant pleads an Act of Parliament, which had given an exclusive jurisdiction of all matters arising within the mines to the courts of *A*: but had not averred there was a court of equity there. Plea overruled.

On a demurrer and plea to a bill to have an account of the profits of the *Mendip* mines in *Somersetshire;* they plead a special Act of Parliament which had* given jurisdiction of all matters arising within the mines to the Courts of ——— exclusive of all other jurisdiction: and it was urged that this was like to the jurisdiction of the sewers, where this court could not intermeddle: but it was answered it was not like that case: because there was a new jurisdiction created and reserved entire within itself: but here the jurisdiction of determining matters relating to these mines is transferred to the courts of ——— which were ancient courts, in which by the common law this court did interpose in equitable matters.

Lord Chancellor, The plea is not good, because although you plead an exclusive jurisdiction, yet you do not aver that there is any court of equity there. (1)

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(1) It appears that the defendants (offering to be examined on interrogatories as to what ore they had taken and on such other matters as the court should direct) were ordered to answer the plaintiff's bill, save only as to the matters of account touching which they were to be examined upon interrogatories after the hearing, Reg. Lib. 1681. B. fol. 656. So in a plea to general jurisdiction of King's superior courts it must be shewn what other court has jurisdiction, Earl of *Derby* v. Duke of *Athol*, 1 Vez. 203. *Secus* as to inferior court you need only plead thereto, and not shew where it is, Earl of *Derby* v. Duke of *Athol*, 2 Vez. 357. And an inferior court must shew jurisdiction, *Rex* v. *Mayor*, &c. of *Liverpool*, 4 Burr. Rep. 2245. Vide also *Peacock* v. *Bell*, 1 Saunders' Rep. 73., and cases cited in note there. So where there is a new or summary jurisdiction created, the plea must set forth the jurisdiction particularly, and that the sentence was according to the jurisdiction, *Gage* v. *Bulkeley*, Ca. Temp. Hard. 275. Note, The court of the county palatine of *Durham*, is an original superior court, *Peacock* v. *Bell*, ub. sup. So the courts of great session in *Wales*, county palatine of *Chester*, and the court of *Ely*, *Pegg* v. *Gardner*, 1 Lev. 208. *Jennett* & *Ux.* v. *Bishopp* & *Al.* post 184. *Portington* v. *Tarbock*, ibid. But a *certiorari* may be brought to remove a cause out of a palatine court of equity into chancery, *Portington* v. *Tarbock*, post 177. Executors shall be presumed to take notice of all judgments in the inferior courts of law, Off. Ex. cap. 12. *Herbert's* case, 3 P. Wms. 117. Even in the court of *pie poudre*, *Searle* v. *Lane*, post 2 vol. 88. So where party insists that the Court of Chancery has not jurisdiction of the matter in question, it seems he must plead to the jurisdiction, and not object at the hearing, *Trelawney* and *Williams*, post 2 vol. p. 284. *Et vide* Mitf. Tr. 123. 180, 2. (3d edit.)

ANONIMOUS.

Case 56.

On a demurrer. Resolved: that where a man exhibits a bill for discovery of a deed, and prays in his bill a discovery only, there a man must make oath he hath lost the deed. But where a man comes, and sets forth the loss of his deed, and prays to be relieved touching the duty coming to him by the deed, there he needs not make such affidavit.

In what case a man must make oath of the loss of a deed, where he brings a bill touching this deed. *Vid. post Case* 175 & 241. 1 Ch. Rep. 11.

(1) This is in all likelihood a mere mistake in the Reporter, as all the cases on this doctrine are directly and uniformly contrary, vide *Whitchurch* v. *Golding*, 2 P. Wms. 540. *Anon.* 3 Atk. 17. *Dormer* v. *Fortescue*, 3 Atk. 132. Vide also Mitford. Tr. 43. 100. (3d edit.) which states the doctrine as the result of the cases to be that a bill for discovery merely, or which only prays the delivery of deeds or writings or *equitable relief* grounded upon them does not require such an affidavit, vide also Eq. Ca. Ab. 13. pl. 3, where this report is taken notice of, and considered as a mistake of the reporter.

DE

TERM. S. MICHAELIS,

34 *Car' II.* 1682.

[60]

IN CURIA CANCELLARIÆ.

ANONIMOUS.

Case 57.

Upon a demurrer: a man having brought a bill for tythes, the defendant demurred, for that he had not offered by his bill to accept of the single value, and yet had alleged in the bill, that the defendant had carried away the corn, &c. without setting forth the tythes according to the statute; (1)

Eq. Ca. Ab. 131 pl. 9. If the executor of a parson brings a bill for tythes, he need not offer to accept the single value, he not being entitled by the statute of *Edw.* VI. to the treble value.

(1) The words of the stat. 2d and 3d Edw. 6. cap. 13. sec. 1. are, "And "that no person shall from henceforth "take or carry away any such, &c. "before he hath justly divided and "set forth, &c. or otherwise agreed "for the same tithes with the *parson*, "*vicar*, *or other owner*, *proprietory* "*or fermor of the same tithes* under "the pain of forfeiture of treble value "of the tithes so taken or carried "away."

ANONIMOUS. and it was insisted for the defendant, that if he should be put to answer this bill, the plaintiff would presently go to law, and give his answer in evidence, and recover the treble value of the tythes; and a court of equity ought not to assist a man in recovering a penalty, nor compel a discovery of a forfeiture.

Afterwards at another day upon a motion this demurrer was over-ruled, the plaintiff in this case being only the executor of a parson, and not the parson himself, and so not entitled to a forfeiture upon the statute. (1)

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(1) Nor does an action lie upon the stat. for a forfeiture thereon, against an executor, for the treble value thereby given, is by way of punishment for the personal wrong, *Weekes* v. *Trussel*, Sid. 181. The parson and the vicar holding distinctly cannot join in an action under the stat. for they claim severally by divided rights, *Champernon* v. *Hill*, Yelv. 63. But where the rights of rector and vicar unite by several titles in one person, he need not bring several actions, as the matter of title is joined in him, and it is sufficient that he declares as farmer or proprietor of the tithes, without saying by what title, ibid. et vide Cro. Jac. 68. Moor, 914. 1 Brownl. 86. S. C. *Cranthorn* v. *Taylor*, 2 Bro. Par. Ca. 513. 2d edit. Nor need a vicar set forth how he is entitled, *Ayde* v. *Flower*, Bunb. 7. *Goole* v. *Jordan*, Bunb. 144. But where question between rector and vicar a court of equity ought not to make a decree in derogation of the title of the rector, unless the title of the vicar is made out clearly, or an issue directed, *Barnard* v. *Garnons*, 1 Anst. 206. 7 Bro. Par. Ca. 2d edit. 105. But it seems two farmers may join in an action on the stat. *Day* v. *Peckvell*, Moor, 915. And a farmer of tithes may have an action under the equity of the stat. though no action is given to the farmer thereby, ibid. sed quære, as to the necessity of resorting to any equity of the statute for he is named in the statute. And note that the jury cannot give other damages than those given by the statute, ibid. Nor could they assess costs as none are given by the statute, sed vide stat. 8, 9 Will. 3d. cap. 11. by which it is enacted "That in all actions for not setting "forth tithes, wherein the single value "or damages found by the jury shall "not exceed 20 nobles, the plaintiff "obtaining judgment or any award of "execution after plea pleaded or de-"murrer joined therein, shall recover "his costs of suit, and if the plaintiff "become nonsuit, &c. he shall pay "costs."

Case 58.

BOVEY *versus* SMITH.

Eq. Ca. Ab. 256. pl. 5. 384. pl. 3. 2 Ch. Ca. 124. S. C.

A TRUSTEE having sold the land to a stranger, that had no notice of the trust, and a fine with * proclamations and five years past, the trustee afterwards, for valuable consideration

Trustee sells the land to one who had no notice of the trust, and after a fine and five years non-claim repurchases the land. Decreed he should stand seized in trust, as before the sale. *Vid. post Case* 74 & 139.

really paid, purchases these lands again of the vendee. And it was decreed by the *Lord Chancellor*, with the concurring opinion of the Lord Chief Justice *North*, that the trustee, notwithstanding the fine, proclamations, and non-claim for five years, should stand seized in trust as at first, as if the land had never been sold, nor any fine levied. (1)

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(1) It appears by the Register's Book that by deed certain premises were conveyed to *W. B.* and *Others*, trustees, their heirs and assigns upon trust, that they and their heirs, and the survivor and survivors of them should at any time convey the same, or any part thereof, and all their estate, &c. to the use of such persons, &c. and for such estate, &c. as *J. A.* by any writing under her hand should limit and appoint, and for default of such limitation or appointment to the use of her four daughters, and the plaintiff her son, and their heirs, equally to be divided between them. *J. A.* afterwards in pursuance of her power, did, by her last will and testament, give to her said four daughters, all the said lands, &c. And if it happened any of them should depart this world, that then their part thereof should come to the survivor of the said testatrix's children that should be living, to the last that should be living of them or their children, being a son or daughter, living at her the said testatrix's death. *J. A.* died seized and possessed of a great real and personal estate; one of the trustees in the deed named being then also dead, *W. B.* one of the surviving trustees, and the other surviving trustees granted the said messuages and lands to the said four daughters, and their heirs, to the only use of them and their heirs. And that afterwards the said daughters then living, and their husbands, levied several fines and made several conveyances between themselves, to which the said *W. B.* was privy, and afterwards the said *W. B.* for a valuable consideration, purchased of the sisters and their husbands in his own name, the inheritance of the premises to him and his heirs for ever, and entered and received the rents, and devised the same to defendant and his heirs for ever. And the court declared that the said fines being levied to parties who claimed under the will of *J. A.* and were fully knowing of the said trust, those fines did not nor could bar, &c. Reg. Lib. 1682. A. fol. 159. Et vide *Cook* v. *Sadler*, post 2 vol. 235. *Mansel* v. *Mansel*, 2 P. Wms. 678. *Jevon* v. *Bush*, post 342. A purchaser with notice from one who bought without notice it is now clearly held may shelter himself under the first purchaser. Contra decreed at the Rolls, but so held on appeal by Lord *Somers*, for otherwise an innocent purchaser might be forced to keep his estate, *Harrison* v. *Forth*, Pre. Ch. 51. So *Brandlyn* v. *Ord*, 1 Atk. 571. *Lowther* v. *Carlton*, 2 Atk. 139. Forr. 187. *Mertins* v. *Jolliffe*, Amb. 313. *Sweet* v. *Southcote*, 2 Br. Ch. Rep. 66. [*Andrew* v. *Wrigley*, 4 Bro. Ch. Rep. 136.] As to what shall be esteemed notice in respect to proceedings in this court, vide *Harvey* v. *Mountague*, ante 57. post 122. *Preston* v. *Tubbin*, post 286. *Self* v. *Madox* & *Al.* post 459. *Finch* v. *Newnham*, post 2 vol. 216. *Herbert's* case, 3 P. Wms. 117. and cases cited in not. there, et vide *Walker* v. *Smallwood*, Amb. 676., where held as a general rule that alienation pending a suit is void. In respect to agents, *Preston* v. *Tubbin*, ub. sup. *Brotherton* v. *Hall*, post 2 vol. 574. *Jennings* v. *Moor*, post 2 vol. 609. *Maddox* v. *Maddox*, 1 Vez. 62. *Le Neve* v. *Le Neve*, ibid. 64. *Ashley* v. *Bayley*, 2 Vez. 370. In respect to the registry in *Middlesex* and *Yorkshire*, there seems to be a disagreement in the cases, *Wrightson* v. *Hudson*, 2 Eq. Ca. Ab. 609. pl. 7. *Backhouse* v. *Bedford*, ibid. 615. pl. 12. *Hine* v. *Dodd*, 2 Atk. 275. *Morecock* v. *Dickins*, Amb. 678. Et vide *Jolland* v. *Stainbridge*, 3 Ves.

478. stat. 7 Anne, cap. 20. The principle on which a party is affected with notice in equity is laid down in *Smith* v. *Low*, 1 Atk. 490. where per *Hardwicke*, *Lord Chancellor*, "Whatever "is sufficient to put a party on an en- "quiry is good notice in equity." And that principle seems to be recognized in the principal case, *Moor* v. *Bennett*, 2 Ch. Ca. 246. *Drapers' Company* v. *Yardley*, post 2 vol. 662. *Pearson* v. *Morgan*, 2 Bro. Ch. Rep. 388. and other cases. [*Hiern* v. *Mill*, 13 Ves. 114. *Daniels* v. *Davison*, 16 Ves. 249. 17 Ves. 433. *Allen* v. *Anthony*, 1 Mer. 282. *Hamilton* v. *Royse*, 2 Sch. & L. 315. *Crofton* v. *Ormsby*, 2 Sch. & L. 583.]

Case 59.

JENKS *versus* HOLFORD.

Eq. Ca. Ab. 151. pl. 6. S. C.

Sums of money given by a freeman of *London* to a daughter, if not given as a marriage portion, or in pursuance of a marriage agreement, no advancement; but however must be cast into *hotch-pot*.

THE plaintiff exhibited his bill, setting forth, that his wife's father was a citizen of *London*, and that he had not advanced her in his lifetime, and demanded her customary part, and prayed an account.

In this case the points insisted on were: *First*, that the plaintiff's wife was advanced by her father in his lifetime, he having given her *four hundred pounds*. But the *Lord Chancellor* was of opinion, that it could not be any advancement, unless it had been given her as a marriage portion, or in pursuance of a marriage agreement; and the *four hundred pounds* were not given till a long time after her marriage, and without any agreement that the same should be for her marriage portion, and was a free gift; great part of the sums that made up the *four hundred pounds* being given her at christenings and lyings-in.

Secondly, It was insisted on by the defendant's counsel, that these several sums, howsoever given, ought, if the plaintiff will come in for his wife's customary part to be cast into *hotch-pot*; but the plaintiff's counsel denied it, and took a difference betwixt a free gift subsequent to the marriage, and where the same is given in marriage: and compared it to the case of an heiress, where she has lands given her in *frank marriage*, those must be cast into *hotch-pot*;
[62] but otherwise if it is of lands conveyed or given to her by her father or other ancestor after the marriage. *Sed non allocatur.*

The *third* point was, that the plaintiff's wife's father having been a great chymist and spent great part of his estate in that study, he had, as was pretended, arrived to great knowledge therein, and had a little before his death given several receipts to the defendant *Holford*, (who had married his other daughter,) to a very great value, as the plaintiff

pretended, and alleged that the defendant made 500*l. per ann.* certain profit of the same; and to incline the court to think they were of such value, the plaintiff offered to give the defendant 500*l.* for his interest in the said receipts; and therefore insisted, that these receipts ought to be looked upon as part of his personal estate, and that the defendant should account for the same.

But Mr. *Solicitor-General*, and Mr. *Keck*, of the defendant's counsel replied, it was a scandal upon the custom of the city of *London* to make such receipts and trifles part of a citizen's estate, especially such receipts as these, which for ought appears are only to make strong water: and they desired to know how they should come to be reckoned part of a citizen's personal estate: for suppose he had communicated the receipts to the defendant by word of mouth, and he had writ them down in his own paper, there had been no colour for it; but now this scrap of paper must be reckoned part of his personal estate; and if they will have an account for so much waste paper, they may take it: and suppose the defendant had published and made common these his choice receipts, what would then have become of the property? and how then would they have belonged to a citizen's personal estate? And this he might have done, and may do, without injury to any man: and it is not like a new invention, for which a man has a patent, that none but himself for the space of so many years shall use the same; *that* may vest a property; but in this case there is no colour for it.

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Chymical receipts not to be reckoned part of a freeman's personal estate.

Lord Chancellor. I will not so far countenance these kind of receipts (which is only a piece of quackery, and serves only to cheat the people) as to put a value on them in *Chancery*. For aught I know, a receipt to make mince-pies or catch rats may be as valuable. (1) And the plaintiff not consenting to cast into *hotch-pot* the four hundred pounds given unto his wife as aforesaid, the bill was dismissed. (2)

(1) [See *Newbery* v. *James*, 2 Mer. 446. *Williams* v. *Williams*, 3 Mer. 160. *Green* v. *Folgham*, 1 S. & S. 398.]

(2) There is merely an order of dismissal, Reg. Lib. 1682. A. fol. 19. Vide *Fowke* v. *Lewen*, post 88, and cases cited in not. there.

Case 60.

Eq.Ca. Ab.141. pl. 2. S. C.

GIRLING *versus* LEE.

Where an equity of redemption or trust-estate is devised for payment of debts, all debts shall be paid equally. Otherwise, if the devise is to the executor, for then the lands will be legal assets.

GREAT part of the lands in question had been settled on the Lady *Lowther* for a jointure by Mr. *Lee* her late husband, father of the defendant; and in the settlement *Lee* covenants that the lands were of the annual value of 800*l.* and in case they should fall short of that value that his other estate should be liable to supply the defect thereof.

After the making this settlement, all the other estate of *Lee* not comprehended in the said jointure was mortgaged for 2,400*l.* and afterwards *Lee* acknowledges a judgment to the plaintiff, who had wrought for him as his tailor, and became bound with him in several bonds; but the judgment was defeazanced on payment of 550*l.* *Lee* makes his will, and devises all his lands for payment of debts.

The bill was to have the trust performed, and the plaintiff's debt satisfied. The defendant in his answer confessed the devise for payment of debts, but sets forth the jointure and covenant and the mortgage.

[64] It was insisted by Mr. *Solicitor-General* and others of the defendant's counsel, that this covenant bound the land, and was precedent to the judgment, as was also the mortgage, and that both these must be satisfied before the plaintiff's judgment; or at least the lands being in mortgage when the judgment was acknowledged, the plaintiff could come in but for an average and his proportion; in regard his judgment could not in law affect these lands, they being then in mortgage; so that it was a security in equity only: and they insisted, that the covenant for making up the jointure ought to be first satisfied, it being expressly charged upon the land: and they cited a case where a man covenanted to settle 500*l.* *per ann.* jointure, and named no lands in particular, yet there it was held, that the lands were bound, and that even against a purchaser; and that if he had afterwards acknowledged any statute or judgment, yet this covenant should be looked upon as a prior incumbrance, and was so decreed.

But it was answered by Mr. *Keck*, being of the plaintiff's counsel, that true it is, where a man covenants in general to settle lands of such a value, and names none, there all the lands shall be bound; (1) but where a man settles such and

(1) Vide *Roundell & Ux.* v. *Breary*, 1 P. Wms. 430., where *A.* covenanted post 2 vol. 482. *Freemoult* v. *Dedire*, to settle lands that should be of the

such lands in particular for a jointure, and afterwards covenants that they are of such a value, there such covenant binds the person only and not the land; but this case indeed was stronger, and did express that the other estate should stand charged to make the jointure of that value: but then he observed, that it was more than forty years since the jointure took place, and that in all this time there had been no demand on pretence of defect in the value of the jointure; and that the defendant had actually paid other debts on bond; so that these pretences carried the face of fraud with them, and seemed only to be set on foot to fence against this poor man's debt, who had been *Lee's* taylor and bondsman. And as to the objection of average, he did admit, that generally where lands are devised for payment of debts, there all sorts of securities, whether statutes, judgments, bonds or simple contract debts, if they do not in their own nature affect the very land so devised (as a judgment cannot, if the land be then in mortgage or the like) there all debts shall be paid in proportion and by average; and so of other equitable incumbrances: (1) but then there is this difference, if the devisee of the lands in trust for payment of debts be also made executor, then do the lands so devised become legal assets: and then debts must be paid according to their precedency or superiority at common law: (2) and so it was resolved in the case of *Hixine* and *Mortly*, (3) which was agreed to be law of all sides; (4) and this case being so, it was decreed that

GIRLING v. LEE.

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value of 60*l. per annum* upon his wife, for her life, and no lands named; *et per cur.*, That covenant does not specially bind any lands. Wherefore, as touching *that* the wife must come in only as a specialty creditor with the other specialty creditors, so *Williams* v. *Lucas*, 2 Cox, 160.

(1) If lands be devised to trustees *for payment of debts*, specialty and simple contract debts shall be paid in proportion, and though the trustees are creditors of the testator, or sureties for him, yet they shall not be allowed to prefer themselves, *Child* v. *Stephens*, post 101. Eq. Ca. Ab. 141. pl. 4.

(2) The decree is so, but the point is not at all discussed. The plaintiff to have his costs. Vide post note 5.

(3) Seems to be *Hixon* and *Wytham*, 1 Ch. Ca. 248, in which the decision is the contrary as to this point, but there was a question as to legacies coming in equally, which was respited.

(4) And so the law seems formerly to have been considered, *Brent* v. *Best*, post 69. *Anon.* post 2 vol. 134. *Greaves* v. *Powell*, ibid. 248. *Cutterback* v. *Smith*, Pre. Chan. 127. *Bickham* v. *Freeman*, ibid. 136. Lord *Marsham* v. *Harding*, Bunb. 339. Sed vide contra *Lewin* v. *Okely*, 2 Atk. 50. [Sanders's edit.] and cases cited in note 2, particularly *Newton* v. *Bennett*, 1 Bro. Ch. Rep. 134, and *Silk* v. *Prime*, cited in note there, in which the cases and course of this doctrine are stated and investigated, and by which the law of the court appears to be now clearly otherwise, and no difference where the devise is to executors only, or to executors and their

GIRLING v. LEE. the lands should be sold according to the trust in the defendant's father's will for payment of debts, and the plaintiff be let in for a satisfaction of his judgment, without regard had to the covenant for making good the jointure. (5)

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heirs, for in both cases they are equitable trustees, the descent is broke, and the specialty creditors have lost their fund, *Silk* v. *Prime*, ub. sup. Vide also *Blatch* v. *Wilder*, 1 Atk. 420, and cases in note there, *Barker* v. *Boucher*, 15th July, 1784, et vide *Hargrave* v. *Tindall*, July 9, 1753. Cited *Newton* v. *Bennett*, ub. sup. where held that estate charged with payment of debts by will *though descended* was equitable assets, and applied to pay off the real incumbrances in the first place, and afterwards of the other debts. [So, *Bailey* v. *Ekins*, 7 Ves. 319. *Shippard* v. *Lutwidge*, 8 Ves. 26. *Clay* v. *Willis*, 1 B. & C. 364.]

(5) 6th August, 1669, Sir *Thomas Leigh*, knight, by his will devised some estates to the defendant Sir *John Lowther*, and two other trustees, defendants, to maintain the defendants *Thomas* and *Woolley Leigh*, during the life of *Mary Doughty*, and devised to the same trustees and their heirs, other estates by name, and all the rest of his real estates in possession or reversion, in trust to sell the same for payment of the debts he should owe at his decease, and gave to his said trustees all his personal estate to be in chief employed for the payment of his debts, and appointed the said trustees executors. And the decree was that the trustees do forthwith execute the trust, and make sale of the manors, &c. devised to be sold by the said will and which are liable so to be. And on refusal to convey to other trustees, to be sold under the direction of the master. Defendants to account for the personal estate and rents and profits, and the moneys raised by the sale or otherwise, of any of the premises, subject to the devise of the will, as they have received the same, since the death of Sir *Thomas Leigh*, and what shall remain in their hands after all just allowances, and what hath or shall be raised by sale of the premises, that the same be applied to pay off the real incumbrances upon the said estate in the first place, (but as to the defendant, the Lady *Lowther's* claim of having her defect in the value of her jointure supplied out of the said lands by virtue of the said covenant, and her having bought in the said mortgage the court reserved the consideration thereof,) and afterwards the other defendants, the creditors of the said Sir *Thomas Leigh*, as far as the said estate would extend. And it was further ordered that the defendants who had any mortgages, statutes, or incumbrances upon any of the said manors, &c. should account for what they had received on account, they having all just allowances. But in case any of the incumbrances upon the estate had been taken in, no more was to be allowed in respect thereof, than what was paid with the cost and charges in respect thereof. And the *Master* was to certify what was remaining justly due to the plaintiff and creditors upon the securities aforesaid, or any of them, and to compute the same with interest ever since it ought to have been paid, and tax them their own full costs, both at law and in this court, which they were to have out of the money that had been or should be raised out of the said estate, wherein the plaintiff and creditors, after all allowances made as aforesaid, were to be preferred according to the nature of their debts, save as to the matter of the Lady *Lowther's* claim, the matter whereof was reserved, Reg. Lib. 1682. A. fol. 148. Entered as *Girling* v. *Lowther*. No account of the cause appears afterwards.

PEITON *versus* BANKS.

Case 61.

A MAN by will devises lands to his wife for life, and as to the said lands he gives the reversion to *A.* and *B.* to be equally divided betwixt them.

Eq. Ca. Ab. 182. pl. 18. 20.

Devise to *A.* for life, the reversion to *B.* and *C.* to be equally divided betwixt them.

The question was, what estate *A.* and *B.* should take by this devise.

Decreed, they were tenants in common for life only. (1)

B. and *C.* tenants in common for life only.

Serjeant *Maynard* (though not of counsel in the case) told us at the bar, he remembered the like but a stronger case so resolved about twenty years since, *viz.* A man having given lands to his wife for life, devises the reversion to *A.* and *B.* *A.* in that case being his heir at law: yet adjudged, that by the devise *B.* took an estate for life only. (2)

2 Ro. Abr. 834. *Ca.* 13.

(1) So as to the estate for life, *Dickins* v. *Marshall*, Cro. Eliz. 330. *Fowler* v. *Blackwell*, Comyn's Rep. 353. *Doe* v. *Woodhouse*, 4 Term Rep. 89. Et vide Co. Litt. 9 *b.* 42 *a.*

(2) There is only a simple order of dismissal, Reg. Lib. 1682. B. fol. 107. Entered *Peyton* v. *Vanacker*.

FRANKLAND *versus* HAMPDEN *et Al'*.

[66]

Case 62.

THE plaintiff this day making default, and upon opening of the cause it appearing that the plaintiff had forged several notes or writings in the defendant's name, it was prayed by the defendant's counsel, that such bills or notes might be torn or obliterated: but Mr. *Solicitor-General* observed to the court, that a forged deed or writing cannot be torn or defaced by law, but must be kept so that the king may proceed upon it against the criminal. (1)

Forged deeds or writings not to be ordered *per Cur'* to be torn or defaced, but kept so, that the king may proceed thereon against the criminal.

(1) It appears that several alterations had been made in a certain ledger book, produced in the cause, and also that a note in question was a forged note, "Whereupon it was "referred to the *Master* to certify the "alterations made in the said book, "and to make the figures therein al- "tered as they were before such al- "terations were made, and that the "said note be brought into court to "the end the same may be made use "of against the said plaintiff, Dr. "*Frankland*, on an information or "otherwise as there shall be occa- "sion, and the said *Master* was to "tax the defendants their full costs, "to be ascertained by the defendant's "own oath in respect of those "abuses." Reg. Lib. 1682. A. fol. 210. So upon *non est factum* at law on forged bond, vide *Fitch* v. *Wells*,

Hill. 4th Anne, B. R. Salk. 215. Otherwise upon a collateral issue, *ibid.* Sed vide *Williams & Ux.* v. *Hulie & Ux.* 1 Sid. 131. Where the bond on *non est factum* found, though suspected to be forged, was delivered to the plaintiffs, and in *Gerrard* v. *Phitton*, ibid. 170, a deed was found on trial to be forged, and carried into the Court of Chancery, the defendant having a year given to him for a new trial, which being had and a similar verdict thereon, the deed was cancelled and destroyed.

Case 63.

GIBSON *& Ux' versus* KINVEN *& Al'.*

Personal estate devised to the wife, upon trust not to dispose thereof but for the benefit of her children. She by will gives 5*s.* only to one child. Decreed the estate to be divided equally.

THE case was, that one *Harris* in his life-time being possessed of a considerable personal estate, and having issue four children, *viz.* two sons and two daughters, and *Mary* one of his daughters being now married to the plaintiff *Gibson*, and *Ann* his other daughter to the defendant *Kinven*, he made his last will and testament in writing, and thereby devised several particular legacies to each of his children, and gave his ready money, goods, plate and household stuff (1) to his wife, *upon trust and confidence that she would not dispose thereof but for the benefit of her children.*

The wife after the death of her husband made her will, and therein calling herself his executrix and residuary legatee, she gives several legacies to some of her children, and but 5*s.* only to the plaintiff and her children, and devises all the rest of her estate to her son *Bartholomew.* (2)

The bill was to be relieved herein, the plaintiff insisting that the wife having devised all this estate to one of her
[67] children *only*, this was a void bequest, and a breach of her trust, and that therefore the plaintiffs ought to be let into a full third part of the said father's estate intrusted with the mother as aforesaid; one of the said brothers after the making of the said father's will dying in his lifetime.

The defendants by answer confessed the will of *Harris* the father, and did admit that one of the brothers was dead in his lifetime; but set forth further that the plaintiff had by some means disobliged her mother in her lifetime: and though they had endeavoured to reconcile them, and to persuade the mother to leave the plaintiff her daughter a better

(1) And personal estate, R. L.

(2) The statement of the bill is, "she was prevailed on to make her "will, and to give all her estates and "some small legacies to *Bartholomew*, "her son, and made the defendants "executors." R. L.

legacy, yet they could not prevail with her to do it. And further say, that about three months since, to prevent disputes there was a case touching this matter drawn up, and agreed to by the plaintiffs, and referred to Sir *Francis Pemberton*, now Lord *Chief Justice of England*, to determine, who gave it as his opinion, that, notwithstanding the words in the will, viz. *upon trust and confidence that she will not dispose thereof but for the benefit of her children*, yet that the executrix had power to dispose of the residue to which of her children she would, and that she was not bound thereby to divide it equally; and that if she had given the plaintiff her daughter but a ring only, it had been good.

After this cause had been much debated, and several precedents produced, where in such cases very unequal distributions had been approved and ratified by this court, the *Lord Chancellor* decreed for the plaintiff; for that the distribution in this case was so very unequal, and that without any good reason shewn to warrant it: and therefore he thought fit to rectify it in this case, and could not do it otherwise than by decreeing an equal distribution. (1)

(1) Reg. Lib. 1682. A. fol. 125. This decree appears to be confirmed on a re-hearing before the *Lord Keeper*, in the Easter term following, and also a further part of the order, whereby the defendants were decreed to come to an account with the plaintiffs for what they had received of the estate of the said *Harris*, so devised during the life of the wife, and for what they had received since her death, and to pay same according to the former order, and the defendant *Kinven* to be examined on interrogatories touching his receipts and payments, Reg. Lib. 1682. A. fol. 538. There appears formerly to have been a strong leaning in the court to *equal division* among the objects of the power, unless a good reason given for the contrary, *Wareham* v. *Brown*, post 2 vol. 153. Sir *George Crook's* case, cited in *Astry* v. *Astry*, Pre. Chan. 256. But this appears not to be now taken as the rule of the court, *Kemp* v. *Kemp*, 5 Ves. 859, which see for the cases and doctrine on the head of illusory appointments, et vide *Pocklington* v. *Bayne*, 1 Bro. Ch. Rep. 450, and cases there cited. *Bristow* v. *Warde*, 2 Ves. jun. 336. *Wilson* v. *Piggott*, ibid. 351. But in case a sufficient reason appears on the face of the appointment a nominal sum may be held good in the case of a stranger appointor, *Spencer* v. *Spencer*, 5 Ves. 368, and proof of such reason may perhaps be admitted where it does not appear in the case of parent and child, *ibid.* So where a father appoints and gives other provision to the object excluded, *Long* v. *Long*, 5 Ves. 447. If the words of the power were to such of the children as appointor shall think proper, *that*, it seems, would give a power to appoint to one only, *Kemp* v. *Kemp*, ub. sup. Et vide *Butcher* v. *Butcher*, 9 Ves. 382, at the Rolls. It appears upon the whole with very few exceptions, that the words of a power to appoint a beneficial subject amongst certain objects, however large, will bind the appointor to dispose of the fund, so that every appointee shall have a substantial share, although it may sometimes be difficult to determine what is an illusory appointment, and what is not. *Et Nota.* The words of the decree, in the present case, as to an

equality of distribution are, "Where- "upon, &c. his Lordship declared that "cases of distribution must be judged "according to the circumstances there- "of, and if no variety in the circum- "stances the court will distribute it in "an equality, but in this case it was "plain the testator did intend there "should be an equality amongst all his "children," R. L. At law a share, however little, will be sufficient, and the power must be executed according to the words, if not, it will be bad, sic dict. per *Master of the Rolls*, *Kemp* v. *Kemp*, 5 Ves. 861. [See further on this subject, *Box* v. *Whitbread*, 16 Ves. 15. *Butcher* v. *Butcher*, 1 V. & B. 79.]

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Case 64.

VERMUDEN *versus* READ.

4,000*l.* portion by marriage articles secured on land: provided if the husband did not settle a jointure within two years, he should have the interest only for his life, and the land to go to the wife and the heirs of her body. The wife dies within the two years, no settlement being made. Husband not entitled to the portion. *Vid. post Case* 160.

Sir Compton Read married his daughter to the complainant, and for securing the payment of 4,000*l.* the daughter's portion, did enter into articles, that the moiety of a certain manor of his should stand charged with it: but it was provided in the articles, that in case Mr. *Vermuden* did not settle upon his lady within two years such a jointure, as by the articles was agreed to be settled, that then the complainant should have only interest paid him for his wife's portion, after the rate of 50*s. per cent.* during his life, and after his decease the lands should go to his wife and the heirs of her body, with a power of redemption to Sir *Compton Read* and his heirs. (1) Sir *Compton Read* dies; and the complainant's wife dies within the two years, he not having settled such jointure, as by the articles he was obliged to settle.

The plaintiff the husband exhibited his bill against the

(1) The proviso was "that if Sir "*Compton*, his heirs or executors, "should, within three months after "the settlement of the jointure pay to "the plaintiff 4,000*l.* and should in the "mean time pay the plaintiff interest "thereon, at the rate of 5*l. per cent.* "*per ann.* at the end of every six "months after the marriage, and in "case the plaintiff should not make "such settlement within the two years, "then if Sir *Compton* should, at the "end of every six months of the plain- "tiff's life, as the same should remain "undone pay unto him interest for the "said 4,000*l.* at the rate of 50*s. per* "*cent. per ann.* and within one month "after the plaintiff's death happening "before his making such settlement, "should pay the 4,000*l.* unto and "amongst his wife and her issue, if "any should be, and the survivor and "survivors of them, and in default "thereof to the plaintiff, his execu- "tors, administrators, and assigns, then "the estate above limited to cease, "and the trustees to stand seised to "the use of Sir *Compton* and his heirs." It appeared that Sir *Compton* before his death, by lease and release conveyed to defendant's trustees the moiety of the manor of *Denford*, subject to the proviso last stated. R. L.

heir at law of Sir *Compton Read*, to be relieved against these articles; and it was alleged on behalf of the complainant, that the estate tail being limited to his wife, she might by a fine levied in her lifetime have barred this estate tail, and might have suffered a common recovery of it, and by that means have barred the remainderman, and that if he had at any time settled such jointure upon his wife, though not within the time prescribed by the articles, he should have been relieved against these articles, and have had the portion decreed him.

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It was demanded by the *Lord Chancellor*, whether they prayed relief against the person, or endeavoured to charge the land. If they went against the land, they must take it *secundum formam chartæ;* and in this case there being no personal covenant, the bill was dismissed: and it was said to be like the case of *Colonel Cheeke* and *my Lord* —— Where *Cheeke* by articles made on his marriage was to have 4,000*l.* portion with his wife; 1,500*l.* paid down in hand, and 2,500*l.* more, if he made a settlement within the space of *three* years. It happened that his lady died within *two* months after the marriage, he not having in that time made such settlement as by the marriage articles he was obliged to have made: and he in that case exhibited a bill to be relieved, and was dismissed. (1)

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Q. If the husband's making the settlement be not a condition precedent to the payment of the portion.

(1) It appears that Sir *Compton Read* did convey to the defendant's trustees by lease and release, 4th and 5th Aug. 31 Car. 2d. the moiety of the manor in pursuance of the articles, and that the plaintiff knew thereof. This deed was by the decree ordered to remain in court for the use of the plaintiff, who was at liberty to have the same out on his own security, in case he chose to take his remedy, if any, at law on the articles and settlement, which, by the decree, he was left at liberty to do. Reg. Lib. 1682. B. fol. 146. Vide post 167, S. C. *Meredith* v. *Jones*, post 463. Judgment of *Master of the Rolls*, in *Parker* v. *Phillips*, 1 Vez. 532. But where wife's father agreed to give a portion, and husband's father to make a settlement though the portion was not paid, the children might compel a settlement, *Harvey* v. *Ashley*, 3 Atk. 610. Vide also *Chilliner* v. *Chilliner*, 2 Vez. 528.

BRENT *versus* BEST & *Al'*.

Case 65.

Eq.Ca.Ab.117. pl.1.143.pl.12. S. C.

Devisee of lands in trust to pay mortgages in the first place, and then legacies, is made executor. He mortgages to raise money to pay other debts of the testator. Such new mortgage shall take place of the legacies.

THE plaintiff exhibited his bill to redeem. The case fell out to be, that one *Jo. Combes* being seized of the copyhold lands in question, and having taken up money upon them,

BRENT v. BEST.

and secured the repayment of the same by several mortgages made of the said lands, he afterwards surrendered them to the use of his last will (which he needed not to have done, for having only an equity of redemption he might have devised them without the formality of any such surrender) (1) and thereby devised them to one *Yeates* in trust in the first place to pay off and discharge the mortgages on the said lands, and in the next place for payment of several legacies, and particularly a legacy of 200*l.* unto the complainant's wife; the remainder in fee to *Yeates*, (2) and makes *Yeates* his executor. *Yeates* proves the will, and pays several debts owing by his testator, that were not mortgage debts; and to raise money for that purpose makes several new mortgages of the lands in question.

The plaintiff being a legatee in right of his wife, exhibited his bill for satisfaction of his wife's legacy, and insisted that after the mortgages made by *Combes* were discharged, the lands then should stand charged with his legacy, and that
[70] then he ought to be let into an immediate satisfaction thereof, and not be postponed by the new mortgages made by *Yeates*.

But by the defendant's counsel it was insisted, that the plaintiff could not be admitted to redeem part, without redeeming the whole. And the land stands charged as well with the mortgages made by *Yeates*, as with those made by *Combes;* and in this case *Yeates* was not only a trustee for payment of debts, but also executor to the devisor, and so the lands in his hands became legal assets, (3) and charged with all the debts of the testator, and by consequence with the new mortgages made by *Yeates*, the money having been raised and applied for payment of the debts of the testator.

But it was replied, *that* was so, where a general trust is raised for payment of all debts, but in this case *Yeates* was a special trustee, and directed by the will to pay off the

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(1) Et sic dict. arg. in *Greenhill* v. *Greenhill*, post 2 vol. 680. Pre. Ch. 322. S. C. *King* v. *King*, 3 P. Wms. 360. So it is the constant rule of this court, per *Master of the Rolls*. *Allen* v. *Poulton*, 1 Vez. 121. But an intent to pass the lands must appear, ibid.

(2) The devise was "to *Yeates*, his "heirs and assigns for ever, upon "trust, to discharge all such mort-"gages as should be charged on the "lands in question *at the time of his*, "*the testator's death*, and afterwards "to pay the said *Susannah*, the plain-"tiff's late wife, and *Ann Yates* 200*l.* "a-piece, on their attaining 21 or "marriage, or within two years after "the said *Robert Yeates* should en-"joy his estate," and no more, and then made *Yeates* executor, R. L.

(3) Sed vide *Girling* v. *Lee*, ante 63. and cases there cited.

mortgages, and then the legacies, and no provision was made for other debts. *Sed non allocatur.* (1)

In this case *Combes* having mortgaged part of his copyhold lands in fee, being customary lands of inheritance, unto one *Best*: *Best* surrenders them to the use of his will, and devises to his wife for life, remainder in fee to the defendant *Barnaish*, and makes his wife executrix; and it was prayed on his behalf, that if the plaintiff redeemed, the defendant *Barnaish* might have a proportionable share of the redemption money, according to the value of the estate he had in the land: and the matter in fact appearing to be so upon the pleadings, although the defendant had no cross bill for that purpose, nor so much as insisted upon it in his answer, it was ordered by the *Lord Chancellor*, that the defendant *Barnaish* should have his proportionable part of the redemption-money. And the ordinary rule of the court in such case was said to be, that one-third of the money should be paid to the tenant for life, and the two-thirds residue to the remainder man. (2)

Mortgagee in fee devised the mortgaged lands to *A.* for life, remainder to *B.* in fee. *A.* shall have one third and *B.* two thirds of the mortgage money.

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(1) It appears that *Yeates* had sold several parts of the estate to persons who stated themselves to be purchasers for valuable considerations, but nothing said of notice, and as against them the bill was dismissed, "they "having purchased from *Yeates* who "was not only an executor but a "trustee, and thereby had power to "sell," the mortgages were forfeited, and mortgagees of *Yeates* denied notice, and then the words of the decree are, "As to the several mortgages "his Lordship further declared that "the said plaintiff should be at liberty "to procure a purchaser to buy all the "said mortgaged premises, or any "part thereof, and that the defendant "*Yeates* and the said mortgagees, "or such of them whose mortgaged "lands should be sold, should join in "the sale of the said premises, and "what money should remain over and "above to satisfy the said mortgagees "their principal, interest, and charges, "the same to go towards the satisfying "the plaintiff the said legacy of 200*l.* "interest and charges, and the re-"mainder, if any, to *Yeates*. But in "default of a purchaser the plaintiff "should have liberty to redeem the "said mortgaged premises, but if no "purchaser, or plaintiff should not "elect to redeem or should not re-"deem, then the bill against mort-"gagees to be dismissed, and *Yeates* "to release, and be barred of equity "of redemption." And an account decreed against *Yeates*, R. L. vide *Eccles* v. *Thawill*, Hil. 1690. Pre. Ch. 18.

(2) Reg. Lib. 1682. A. fol. 139. Entered *Brent* v. *Yeates*. In *James* v. *Hailes*, Pre. Ch. 44., it is said if estate in mortgage be settled on *A.* for life, and then to *B.* in tail or in fee, tenant for life shall bear 2-5ths of principal and interest, and remainder-man 3-5ths. S. C. more fully reported, post 2 vol. 267. But the rule was considered settled as in the principal case, *Cornish* v. *Mew*, 1 Ch. Ca. 271. *Ballet* v. *Sprainger*, Pre. Ch. 62. *Clyat* v. *Batteson*, post 404. *Jones* v. *Selby*,

Pre. Ch. 290. *Anon.* 1 P. Wms. 650. *Partridge* v. *Pawlet*, 1 Atk. 467. But it applies only to the time of actual enjoyment, *Tracey* v. *Hereford*, 2 Bro. Ch. Rep. 328. Et vide the other cases cited by Mr. *Sanders*, in his note on *Partridge* v. *Pawlet*, ub. sup. So in the case of tenant for life of estate held for lives, one of the lives drops, the rule of the court is that tenant for life shall pay 1-3d of the charges of renewal or keeping down the interest, *Verney* v. *Verney*, Amb. 88. [But now the rule is, that the tenant for life is to pay in proportion to the benefit he derives from the renewal. *White* v. *White*, 9 Ves. 554. *Allan* v. *Backhouse*, 2 V. & B. 65.]

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FERRARS *versus* FERRARS.

Case 66.

Eq. Ca. Ab. 61. pl. 3. S. C.

The husband's executors are sued at law for goods bought by the wife in her husband's lifetime, while she lived separate, and had a separate maintenance, and this known to the tradesman that sold the goods. Bill brought for relief. Injunction denied, it being a proper defence at law.

A BILL was exhibited to be relieved against an action at law; and upon a motion for an injunction, the case appeared to be:

The Lady *Ferrars*, the defendant, lived separate from her husband, and had a separate maintenance allowed her by her husband, and took a house in *London*, and bought goods and other furniture of the plaintiff at law, for furnishing of the said house: and now the executors of her husband, being sued at law for these goods bought by her, whilst she lived apart from her husband, and had a separate maintenance (which was, as the plaintiff's counsel alleged, well known to the plaintiff at law, of whom she bought these goods) brought their bill in equity to be relieved against this action, insisting that the plaintiffs at law ought not to charge the husband or his executors for these goods.

But the equity not being confessed by answer, the defendants swearing that the wife's living separate was with her husband's good liking and by his direction; and that they (the defendants) hoped to prove that she was directed by her said husband to buy these goods, and that he declared he would pay for them.

Upon hearing counsel on both sides an injunction was denied, it being after a verdict, (1) and for that the plaintiff's bill contained no equity; and their allegations, if true, would have been a proper defence at law.

1 Sid. Rep. 109.

In debating this matter was cited *Scot* and *Manby's* case. (2)

(1) Vide *Barbone* v. *Brent*, post 176. and cases cited there.

(2) Reg. Lib. 1682. A. fol. 208. Vide *Augier* v. *Augier*, Pre. Chan.

495. *Anon.* ibid. 502. *Todd* v. *Stokes*, Raym. 444. 1 Salk. 116. *Etherington* v. *Parrot*, 1 Salk. 118. 1 Bac. Ab. Tit. *Baron* and *Feme*. Sed vide *Marshall* v. *Rutton*, 8 Term Rep. B. R. 545. by which upon the opinion of all the Judges the law is settled that a married woman, though living apart from her husband, and having a separate maintenance secured by deed has not a capacity to contract debts, and be sued at law as a *feme sole*. The modern cases in equity containing the learning on the subject of the wife's power over her separate maintenance are to be found as referred to in note (A) in *Chassaing* v. *Parsonage*, 5 Ves. 17. [See also note (z) to *Powell* v. *Hankey*, 2 P. Wms. 85. 6th edit.] Et vide in the case of banishment or abjuration of husband, *Newsome* v. *Bowyer*, 3 P. Wms. 37.

FARRINGTON *versus* CHUTE & *Ux.*

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Case 67.

Bill for an account of a copartnership.

THE plaintiff's bill being to have an account of a trade in copartnership between his testator and one *Baker*, the defendant *Chute's* wife's former husband, which ended about twenty years since,

Defendant pleaded an award, averring the matter in question comprised in the award.

The defendant pleaded an award in bar, and averred, that the matter in question was comprehended in the award.

Plaintiff replied generally to the plea; and though the plaintiff ought to have set down the plea to be argued, and not to have replied to it, yet court decreed defendant to account. But afterwards, though this decree was signed and enrolled, court ordered defendant only to answer over.

The plaintiff replied generally, that there was no such award.

This cause had been twice heard upon the plea, and each time the plea adjudged against the defendant by the Lord *Chancellor*, he conceiving the plaintiff's present demand, by reason of an exception in the award, not to be therein comprehended, and directed the defendant to account.

It was this day moved by Mr. *Keck*, that the plaintiff in strictness had concluded himself, and by the forms of the court was ousted of his demand: for having replied generally to the plea, that there was no such award, this admitted the plea to be a full bar, if the same were proved to be true; and the plaintiff must take it as the defendant has pleaded it, with the averment, that the matter in question is comprehended in the award, so that in strictness the plaintiff was concluded, and the defendant had nothing more to do, but only to prove, that there was such an award. (1) How-

(1) So *Parker* v. *Blithmore*, Pre. Ch. 58. *Harris* v. *Ingledew*, 3 P. Wms. 95.

FARRINGTON v. CHUTE.

ever he declared, they were willing to relinquish this advantage, although he cited a case in point, where a very honest and equitable demand was lost upon this very thing, and though it was a case of extremity, the plaintiff there could never get over it; but it was ruled against him upon long and great debate. But then if the defendant waved this advantage, he must not be in a worse condition for the plaintiff's mistake, who ought to have replied specially, that the matter in question was not comprehended in the award; and then the defendant had been at liberty to corroborate his plea by proof, which he was now ousted of; and that in truth there ought to have been in this case, upon the over-ruling of the plea, a *respondeas ouster* awarded, and not an account immediately directed; and therefore insisted that the defendant might be at liberty to answer, or that the cause might be reheard (which indeed was the only point aimed at.)

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But Mr. *Solicitor-General* for the plaintiff answered, that upon the general replication it was not to be taken that no award at all was made, but that there was no such award as the defendant had pleaded, including the plaintiff's demand; and the defendant had failed in producing any such award, his Lordship having adjudged that the award by them produced on hearing of the plea did not include the trade of which the plaintiff demanded an account. And Sir *Jo. Churchill* insisted, that where a man pleads in abatement only, there indeed upon the over-ruling of his plea only a *respondeas ouster* shall be awarded: but where a man pleads a plea in bar, as in this case, the same is peremptory. (1)

The result of the debate was, that the defendant should answer, and be at liberty to corroborate the matter of his plea by proof. (2)

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(1) [See *Wood* v. *Strickland*, 2 V. & B. 158.]

(2) Reg. Lib. 1682. A. fol. 60.

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ANONIMOUS.

Case 68.

Eq. Ca. Ab. 305. pl. 12. S. P.

Statute of limitations attaches on the demand pending a suit in equity for the same.

Court of equity will not suffer the statute of limitations in such case to be pleaded at law.

UPON a motion, the *Lord Chancellor* declared, that if a man sued in Chancery, and pending the suit here, the statute of limitations attached on his demand, and his bill was afterwards dismissed, as being a matter* properly determinable at common law: in such case his Lordship would take care to preserve the plaintiff's right, and would not suffer the statute to be pleaded in bar to his demand. (1)

(1) Contra *Gilbert* v. *Emerton*, post 2 vol. 503. *Craddock* v. *Marsh*, 1 Rep. in Chan. 109. *Hurdret* v. *Calladon*, ibid. 214. *Pierce* v. *Bellamy*, cited in *Gilbert* v. *Emerton*, ub. sup. *Anon.* 2 Chan. Ca. 217. *Lake* v. *Hayes*, 1 Atk. 282. *Anon.* 2 Atk. 1. *Mackenzie* v. Marquis of *Powis*, 4 Br. Parl. Cases 328. *Sturt* v. *Mellish*, 2 Atk. 615. The appointment of a receiver will not alter the possession of the estate, so as to prevent the statute of limitations running on during the right in dispute, *Anon.* 2 Atk. 15. But Lord *Hardwicke* is reported to have overruled a plea of a fine and non-claim, because the pendency of the suit in equity, as it was a proper matter of equity, has prevented the running of the fine, *Baker* v. *Pritchard*, 2 Atk. 389. Vide *Pincke* v. *Thornycroft*, 1 Br. Ch. Rep. 289. And if by injunction or any act of the court the party be stayed there, the court will not permit advantage to be taken of the statute at law, *Anon.* 2 Ch. Ca. 217.

CHARLES WEST, ARM' *versus* Lord DELAWARE and Sir JO. CUTLER.

Case 69.

Eq. Ca. Ab. 35. pl. 7.
2 Vent. 357. S. C.

Two defendants to a bill: one of them puts in an insufficient answer, which is so reported, and on exceptions to master's report confirmed.

THE plaintiff being the Lord *Delaware's* eldest son, exhibited a bill to be relieved touching some articles made on his marriage, his father having received nine thousand pounds of his wife's portion, and yet refused to make any settlement but took advantage of a defect in the marriage articles: and in order to be relieved thereon, prayed a discovery of the incumbrances on his father's estate agreed to be settled on the marriage.

Afterwards the other defendant puts in the like insufficient answer. Court for avoiding delay will judge on the insufficiency of this answer, without sending it to a master.

Sir *Jo. Cutler* had formerly answered, that the plaintiff by the articles made on his marriage had no title to the estate in question, and therefore insisted he was not bound to discover the incumbrances.

WEST v. DELAWARE.

Upon exceptions taken to this answer, the Master reported the answer insufficient; and upon exceptions taken to the report, the report was confirmed by the *Lord Chancellor*, who ordered that the defendant should answer as to the incumbrances.

After this, Lord *Delaware* put in just such another answer, and insisted upon the same matter.

The plaintiff, to avoid delay sought by the defendants (instead of excepting to the Lord *Delaware's* answer, and getting a report upon it, and then waiting for exceptions to the report, and bringing those on before the court for judgment, as the plaintiff had before done with Sir *Jo. Cutler's* answer) petitioned the *Lord Chancellor*, that the matter might be immediately brought before him for his judgment on the insufficiency of this answer, which was put in purely for delay; and the petition having been granted, it was now moved to discharge that order, alleging, that it introduced a new form in the court, and it must needs bring great and unnecessary trouble on his Lordship, and many other inconveniences, not now foreseen, might ensue upon it; and by this means *Masters in Chancery* would in a great measure become useless: and the course of the court is the law of the court; and that is the law of the land, and ought not to be varied or changed for any man's particular conveniency. (1) *Sed non allocatur;* and the Lord *Chancellor* declared, he would without more ado be attended in this matter. (2)

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(1) *Davis's* Case, 1 P. Wms. 699.

(2) By the Register's book it appears that no opposition was made, and the order made was "That inasmuch as to refer the said defendant's several insufficient answers would delay and prejudice the plaintiff, which he was willing to prevent, so as the said defendants might perfect their answers on interrogatories after the hearing, as the court should direct, it is ordered on hearing the defendant's counsel who did not oppose the same, that the matter of the insufficiency of the defendant's answer, should be respited till the hearing, and that the said defendants should be examined on interrogatories to perfect the answers as the court should on the hearing direct." Reg. Lib. 1682. B. fol. 214, 297. Vide post 198. S. C.

COMES ARGLASSE *versus* MUSCHAMP.

Case 70.

Eq. Ca. Ab. 133. pl. 2. 2 Ch. Rep. 266. S. C.

Court of equity in *England* will relieve against fraudulent conveyances gained of lands in *Ireland*, when defendant is in *England*.

THE plaintiff having exhibited his bill to be relieved against the grant of an annuity or rent-charge of 300*l. per annum* charged upon his lands in *Ireland*, setting forth that the said grant was obtained from the late Earl of *Arglasse*, by the defendant *Muschamp*, upon a fraudulent practice here in *London*: the defendant pleaded to the jurisdiction of the court, that the lands lying in *Ireland*, the matter was properly examinable in the Court of Chancery there, and that this court ought not to interpose: Mr. *Wallop* and others of the defendant's counsel arguing, that though in extraordinary cases the Chancery here might have a jurisdiction of matters in *Ireland*, yet in ordinary cases it had not; and in case of contracts made in *London*, an *Irishman's* being occasionally here, would not intitle this court to a jurisdiction, and cited the Doctors of the civil law, who treat of jurisdiction in point of residence arising only where a man commonly inhabits, and where he may be said to have his *domicil*; and that undoubtedly the Chancery of *Ireland* had a jurisdiction in this [76] case, the lands concerning which the litigation arises, lying there: and though all equity is founded upon general reason, and so all laws are said to be founded upon reason, yet reason doth diversify itself into several laws in each kingdom, which are made conformable *quoad hic et nunc*; and so it comes to pass, that the municipal laws of all countries and kingdoms differ; and if this court should assume a jurisdiction in this matter, the Chancery of *Ireland*, and with greater reason, might do the like; the consequence whereof would be, that upon the difference of the laws of each nation, different decrees would be made, and so the jurisdictions might clash, and their decrees be repugnant, and the defendant prosecuted in each court for the same matter, and yet not able to comply with both: and it is an argument, that this court has not a jurisdiction in this case, because it is deficient in power, as this case is, to execute its own decrees, for this court cannot award a sequestration against lands in *Ireland*. (1)

(1) Vide Earl of *Athol* v. Earl of *Derby*, 1 Chan. Ca. 221, where said by Serjeant *Maynard*, and not contradicted, that this court could not by decree bind the isle of Man it being out of the power of any Sheriff. But

ARGLASSE v. MUSCHAMP.

But for the plaintiff it was answered, that the primary jurisdiction of this court is to relieve against frauds and cheats, and the fraud by the bill charged arises here, and if the laws of *Ireland* so far differ from the laws here, (which they hoped they did not,) as to allow of a fraud or cheat, this court had then the greater reason to retain this cause, and see justice done. And there could be no fear of different decrees, for it would be a good plea there, that this court was possessed of the cause, and had decreed in it. And as now they endeavour to oust this court of its jurisdiction, because the lands lie in *Ireland*, they might much better plead there, that the fraud arose in *England*. And as to what was objected, that this court had not power in this case to compel an execution of its decree, which if admitted, were the unhappiness of the suitors only, and could be no grievance to the defendant; yet they would in this case content themselves with the defendant's person, in case no sequestration was to be had. (1)

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Lord Chancellor. This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands, and grant a sequestration to execute a decree, then they readily tell you, that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you, you must not intermeddle here, because the fraud, though committed here,

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upon a *scire facias* to repeal letters patent granted of this whole island this court would have jurisdiction. So of a mortgage made of the island, Earl of *Derby* v. Duke of *Athol*, 1 Vez. 204. Although it appears that neither the common nor statute law of England extend to it unless expressly named, or some necessary conveyance resulting from it, Earl of *Derby* v. Duke of *Athol*, 2 Vez. 350. Vide also Fonbl. Tr. Equity, Book 1. ch. 1. s. 6. In the case of Sir *John Fryer* v. *Bernard*, 2 P. Wms. 261, upon a motion for a sequestration against defendant's real and personal estate in Ireland, it being suggested to the court that the defendant had no estate any where but in Ireland, motion granted upon a sequestration first taken out here, and *nulla bona* returned. Quære by Reporter, to whom such sequestration should be directed, and said in that case that application for sequestration against lands in any of the plantations should be made to the King in council, and not to this court. But in such a case it seems this court will entertain a bill for discovery, Earl of *Derby* v. Duke of *Athol*, February 8, 1748-9, 1 Vez. 205, Mit. Tr. 184.

(1) Besides it did not appear but that in this case the defendant might have had other lands in England, and then those would be subject to a sequestration, vide post 135. S. C.

concerns lands that lie in *Ireland*, which makes the jurisdiction local; and so would wholly elude the jurisdiction of this court. But certainly they forget the case of *Archer* and *Preston*, in which case, if in any, the jurisdiction was local, the matter there being not only for land that lay in *Ireland*, but of a title under the act of settlement there; yet the defendant coming into *England*, a bill was exhibited against him here, and a *ne exeat regno* granted, and he put to answer a contract made for those lands; and when he departed into *Ireland* without answering, he was sent for over by a special order from the *King*, and made to answer the contempt, and to abide the justice of this court; for the *King* will maintain the authority of his courts, when they act according to law and reason. (1)

The plea was over-ruled, and the defendant ordered to pay costs for endeavouring to oust the court of its jurisdiction. (2)

Vid. the case of Lord *Kildare* and Sir *Morrice Eustace*. 2 Ch. Rep. 188.

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(1) Articles executed in England under seal, for mutual consideration, give jurisdiction to the King's Courts, both of law and equity whatever be the subject matter, *Penn* v. Lord *Baltimore*, 1 Vez. 447. So where the defendant is here in *England*, though the subject matter of the suit may lie out of the kingdom, yet, if such defendant be served with the process of the court he cannot plead to the jurisdiction, *Toller* v. *Carteret*, post vol. 2, 495.

(2) Lands in the plantations abroad are said not to be within the jurisdiction of this court, although it appears that in case of a sale of plantation lands being ordered, this court must have a power of enforcing a decree for a sale upon the person ordered to convey, *Roberdeau* v. *Rous*, 1 Atk. 543. Sed vide *Foster* v. *Vassall*, 3 Atk. 589. Lord *Cranstown* v. *Johnston*, 3 Ves. 182. Lord *Henley*, C. refused to direct an issue to try the validity of a will made in *England*, materially on the fact of the lands lying in *Pensylvania*, for a will of lands lying in any of the colonies is not triable in *Westminster Hall*, and in Lord *Robert Manners'* case an attempt to get an issue directed to try will of lands in *Ireland*, was given up, nor is there any instance of such an issue being directed, *Pike* v. *Hoare*, Amb. 428. [S. C. 2 Eden 182.] There seems upon the whole to be some doubt as to the extent of the jurisdiction of the court, in regard to lands situated in a foreign country; according to the report of the case of Lord *Cranstown* v. *Johnston* above mentioned, the *Master of the Rolls* in his judgment says, "It "was not much litigated that the courts "of equity here have an equal right to "interfere with regard to judgments or "mortgages upon lands in a foreign "country, as upon lands here. Bills "are often filed upon mortgages in the "*West Indies*. The only distinction "is, that this court cannot act upon "the land directly, but acts upon the "conscience of the person living here, "*Archer* v. *Preston*, 1 Eq. Ca. Ab. "133. pl. 3. Lord *Kildare* v. *Eustace*, "1 Vern. 419. Those cases clearly "shew, that with regard to any con-"tract made or equity between persons "in this country respecting lands in a "foreign land, particularly in the "British dominions, this court will "hold the same jurisdiction, as if they "were situated in *England*. Lord "*Hardwicke* lays down the same doc-"trine in 3 Atk. 589." In that case Lord *Hardwicke*, according to the printed report says, "the different

" courts of equity are held under the " same crown, though in different do- " minions, and therefore considering " this a court abroad, the point of " jurisdiction is the same as if in *Ire-* " *land*, and it is certain where the pro- " vision is in *England*, let the cause " of suit arise in *Ireland*, or the plant- " ations, if the bill be brought in *Eng-* " *land*, as the defendant is here, the " courts do *agere in personam*, and " may by compulsion on the person " and process of the court compel him " to do justice." *Foster* v. *Vassall*, 3 Atk. 589. In *Stribley* v. *Hawkie*, 3 Atk. 275, a writ of assistance was ordered to be granted after injunction, the lands lying in *Cornwall*, but vide post this case p. 135, where it seems conceded by the court that it would not bind the lands by a sequestration. Quære, therefore as to writ of assistance. This court will not decree on a bill for partition of lands in *Ireland*, though good for an account of the profits, Sir *William Pettit's* case, cited post 241. *Cartwright* v. *Petters*, 2 Ch. Ca. 214. Hil. 27 Cha. 2d. Vide also *Mostyn* v. *Fabrigas*, Cowp. Rep. 161, as to action at law against Governor of *Minorca* for trespass and false imprisonment committed there, and held it was well brought. Bacon's Tracts, 283.

Case 71.

WILCOX *versus* STURT.

Defendant pleads that the plaintiff in equity brought an action at law for the thing in question, and on full evidence was nonsuited.

UPON a plea, the bill was to be relieved for a sum of money secured to the plaintiff by a mortgage, and for which bonds were also given by the defendant.

As to the bonds, the defendant by way of answer set forth, that the same were delivered by the defendant as *escrows* only for the plaintiff's use, to be delivered over to the plaintiff, upon the plaintiff's giving a release, which he refused to do. And the defendant pleaded that the plaintiff upon full evidence was nonsuited in an action of trover brought at law for those bonds.

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It was urged by the plaintiff's counsel that a nonsuit was a new sort of plea, and it was no bar even at law, much less ought it to be so taken in equity, and it looks odd, that when the plaintiff comes and complains that he has no remedy at law, the defendant should tell the plaintiff that the plaintiff is without remedy at law, and therefore he shall not be relieved in equity: and if nonsuits, which often happen upon trivial mistakes, and many times upon accidents, should be admitted as bars in equity, it will make an end of a great many cases.

As to the validity of the plea no certain rule was given: but *Lord Chancellor* said, in this case you shall have no decree for the duty on the bond as upon bonds lost or torn; but you shall be at liberty to give the bonds in evidence to

prove the debt secured by mortgage. In which rule each side seemed to acquiesce. (1)

WILCOX v. STURT.

(1) The decree was, "That the "plaintiff should be at liberty to pro- "ceed in this court upon the answer "already put in to recover the money "for which the said bonds were "given, and should be at liberty to "mention the entering into the said "bonds by way of evidence for the "recovery of the said money, as there "shall be occasion. And as to the "relief touching the re-delivery of "the said bonds, his Lordship doth "order that the said plea *do stand* "*and be allowed.*" Reg. Lib. 1682. B. fol. 163.

DURDANT *versus* REDMAN. Case 72.

IN this case the defendant having pleaded a frivolous plea, Mr. *Steadman* of counsel with the defendant offered to demur at the bar for want of parties.

Eq. Ca. Ab. 42. pl. 4. S. C.

Where a defendant has demurred, he may assign another cause of demurrer at the bar, paying costs, and if such cause of demurrer is overruled, he ought to pay double costs.

But Mr. *Keck* of counsel for the plaintiff insisted, that if he would demur at the bar, he must by the rules of the court pay costs before he be heard, (1) which Mr. *Steadman* consenting to, he went on and opened his demurrer, and shewed a sufficient cause of demurrer.

But then Mr. *Keck* told him, his demurrer could not be received, for that a man cannot demur at the bar,* unless there be a demurrer in court, and in this case the defendant had pleaded only; and thereupon the plea was over-ruled, and the demurrer disallowed: and in strictness the defendant ought to have paid double costs.

But when a defendant has pleaded, and there is no demurrer in court, he cannot demur at the bar, though he would pay costs.

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(1) But this appears not to be now the practice, vide *Tourton* v. *Flower*, 3 P. Wms. 371. which case was cited and followed by the Court of Exchequer in the case of *Broderip* v. *Phillips*, Feb. 1803, not reported; where demurrer in writing for want of parties would have been over-ruled, but was waived on argument, then demurrer at the bar *ore tenus* for want of equity allowed. No costs on either side; vide Lord *Clarendon's* orders, 12, 13, 14. [But see *Attorney-General* v. *Brown*, 1 Swan. 288.]

Case 73. ALEXANDER POPHAM *versus* BAMPFEILD & *Al'*.

13 *Novembris*, 1682.

In Court.

Eq. Ca. Ab. 108. pl. 2. Salk. 236. S.C. (1)

Devise of lands to trustees to the use of plaintiff and his heirs male in case plaintiff's father settle two thirds of the estate which was settled on plaintiff's father on his marriage, and in default thereof, or in case of plaintiff's death without issue, trustees to hold the lands to their own use.

THE case upon the pleadings appeared to be thus: one *Rogers* who had married his niece to the plaintiff's father, being seized in fee of lands of the value of 1,500*l.* per ann. devised those lands to the defendant *Bampfeild* and others for the payment of his debts, and after his debts paid, then in trust for the use and benefit of the plaintiff and his heirs male; but declared his will to be, that the plaintiff should have no benefit of this devise, unless Sir *Francis Popham*, the plaintiff's father, should settle upon the plaintiff two full thirds of his estate settled on the said father on his marriage, and in default thereof, devised the said estate to his trustees; or in case the said Sir *Francis* should make such settlement, yet then, if the plaintiff should happen to die without issue, in such case likewise he gave the said estate to his trustees, discharged of the trust for the plaintiff. (2)

The plaintiff's father in his lifetime, that he might entitle the plaintiff, his son, to this devise, makes a settlement of his estate, with a power of revocation.

And the now defendants the trustees exhibited a bill against Sir *Francis*, to compel him to make a settlement according to *Rogers's* will.

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Plaintiff's father by will devises all his lands, being 6,000*l. per annum*, charged with 30,000*l.* debts, to his son the plaintiff for life, remainder to his first, &c. son in tail male.

In answer to which bill, the said Sir *Francis* sets forth, that he had made a settlement of his estate, and, as he conceived and was advised, pursuant to that will: but however, in case the court should not think that settlement sufficient, and according to the intent of the will, * he was ready and willing to make such settlement as the court should direct; and within some short time afterwards, and before any thing

This is a good performance of the condition. *Vide post Case* 159.

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(1) Said to be wrong reported in Salkeld, *Attorney-General* v. *Sutton*, 1 P. Wms. 760.

(2) The words of the devise according to the Register's Book are, "But "in case the plaintiff's father should "refuse by good assurance to settle "two full third parts, &c. the trust "as to that to be void," and the testator further declared, "that from "and after plaintiff's death without "heir male, or after Sir *Francis Pop-* "*ham's* refusal to make such settle- "ment as aforesaid, that his trustees "should stand seized in trust for "*Bampfeild* and *Winter*, two of his "trustees, and for one Sir *John St.* "*Barbe*," R. L.

further had been done in this cause, he dies, having first made his will, and thereby revoked all former settlements, and devised all his estate to the plaintiff, his son, in the first place for the payment of debts, and then to the plaintiff for life, and then to his first, second, third, and so to his tenth son in tail, &c. which whole estate was alleged to be 6,000*l.* *per ann.* and the debts not above 30,000*l.*

Hereupon the plaintiff, now an infant, exhibits his bill to discover what debts the said trustees the defendants had paid, and to have an account, to the end that the plaintiff might be let into the benefit of the devise in *Rogers's* will.

It was in the first place insisted upon by the defendant's counsel, that the plaintiff had no title to sue in equity, for that here was no trust, but if he was to take any thing by this will, the estate was executed to him at law already by the *statute of uses*, (1) the words being, *in trust for the use and benefit of the plaintiff*, and therefore he might seek his remedy at law.

Which was admitted to be so, by the plaintiff's counsel, and by the court; but however it was insisted, that the plaintiff was proper in equity, for that he was entitled to have an account of the estate, and to discover what debts were paid, in order to be let into the said estate.

It was argued by the defendant's counsel, that the plaintiff's father had undoubtedly a power to have prevented his son's having any benefit of this devise, as in case he had absolutely refused to make any settlement; and it was insisted that in this case the plaintiff's father had defeated his son of the benefit intended him by *Rogers's* will, as effectually as if he had made such absolute refusal, for that this was in nature of a condition precedent, and was not a condition to divest an estate, but the plaintiff was to take an estate by his father's performing of this condition; and this condition was in no sort performed; whereas such conditions in equity, if not precisely, yet at least ought to be performed *cy pres*, (2) and especially in this case, the plaintiff being no purchaser, and therefore if the condition be not so performed, as to entitle him at law, he ought not to be aided in this court, unless there had been some practice in the defendants to pre-

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(1) 27 Hen. VIII. cap. 10. et vide *Nevill* v. *Saunders*, post 415. and cases cited in note there.

(2) Vide Co. Litt. 206 a. and 219 a. as to distinction in respect of performance between conditions precedent and conditions subsequent, vide also *Peyton* v. *Bury*, 2 P. Wms. 626.

POPHAM v. BAMPFIELD.

vent or obstruct the performance of this condition, whereby to gain the estate to themselves; but of this there is not the least shadow of proof: (1) and that the condition is not in this case performed, is manifest; for as to the settlement made by Sir *Francis* in his lifetime, *that* was with a power of revocation, and was actually revoked by his will; and as for his will, they did admit, that he might, as this case is, have made a sufficient settlement by his will, and as available, as if the same had been by act executed in his lifetime; but they insisted, that by his will he had not made any such settlement, as was required; neither as to the quantity nor quality of the estate devised. For in the *first* place, the estate was incumbered with very great debts, and so could in no sort be reckoned a quiet or complete settlement. *2dly*, one third of the estate devised would not satisfy the debts. And *3dly*, by *Rogers's* will Sir *Francis* was to settle two-thirds of his estate upon the plaintiff and his heirs males, which was a fee simple, or at least an estate tail, being in case of a will; but here he had devised to his son an estate for life only: and for an authority that equity shall not relieve against the non-performance of such a condition they cited *Fry* and *Porter's* case. (2)

But it was answered by the plaintiff's counsel, that Mr. *Rogers's* intent in this will appeared to be only to preserve as great an estate in the family, as he could, and make this devise with such a condition, with an intent only thereby to oblige the plaintiff's father to leave him the greater estate; and the intent of the devisor ought to be chiefly regarded in his will; and this condition, which the testator intended for the benefit and advantage of the plaintiff in equity, ought not to be turned upon him to his prejudice: and the intent Mr. *Rogers* had of preserving an estate in the family, was better answered by the devise in Sir *Francis's* will, whereby the plaintiff is made barely tenant for life, than if he had been tenant in tail or in fee: and they insisted, that by the will the defendants the trustees were to request Sir *Francis Popham* to make the settlement, which for aught appeared they had not done, and so they had failed in performing of

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(1) That where a remainder-man, who is to take the estate on non-performance of the condition, has used any indirect practice or contrivance to prevent the performance, equity will relieve, vide Lord *Falkland* v. *Bertie* & *Ux.* post 2 vol. p. 344. Salk. 231. 12 Mod. 184.

(2) 1 Mod. Rep. 300. and 1 Chan. Ca. 138.

the first act, and ought not to take benefit of their own laches. (*Mes semble moi*, that the exhibiting such bill against Sir *Francis* as aforesaid was a sufficient request) and that they were mistaken, who called this a condition precedent, for that in truth it was a condition subsequent, for the estate vested by the will upon *Rogers's* death, and Sir *Francis* had all his life-time after to perform the condition; and a difference was taken, where the condition was to be performed by the party himself, who was to have benefit thereby, and where by a third person.

Lord Chancellor. This devise by Mr. *Rogers* to Sir *Francis Popham's* family was an act of great honour and gratitude, and yet but a just retribution; for it appears by the acts of this court, that Mr. *Rogers* had this estate out of that family; and although this settlement be allowed to be good, yet still the trustees may have a benefit by this devise, that is, in case the plaintiff, who is now an infant of tender years, die without issue.

1*st*. I take it clearly, that this is no trust, but an estate vested at law, and well executed by the statute of uses; for the trust here arises out of the estate, and in such case the devisee might by the statute of 1 Rich. 3., have made leases.

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2*dly*. It is as clear, that this is a condition subsequent, and not a condition precedent, (1) and that will make a very great difference in this case; for precedent conditions must be literally performed; and this court will never vest an estate, where by reason of a condition precedent, it will not vest in law. And so it was ruled here in my Lord *Feversham's* case, though the Lords afterwards reversed that decree. But of conditions subsequent, which are to divest an estate, there it is otherwise; yet of subsequent conditions, there is this difference to be observed, (for against all conditions subsequent, this court cannot, nor ought to relieve) when the court can in any case compensate the party in damages for the non-precise performance of the condition,

No relief in equity, in case of a condition precedent, if not performed.

Equity relieves against breaches of a condition, where court can make a compensation.

(1) There are no technical words to distinguish conditions precedent and subsequent, but the same words may indifferently make either according to the intent of the person who creates it, *Robinson* v. *Comyns*, Ca. Temp. Talbot 166. Neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed, per *Ashurst*, J. in delivering the opinion of the court of K. B. in *Hotham* v. *East India Company*, 1 Durnford & East, 645. Vide also Co. Litt. 201 *a*. et seq. Shepherd's Touchstone, 4th ed. p. 117 and 118, and cases cited in note there.

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there it is just and equitable to relieve, (1) as if a man's estate be upon condition to pay money at a certain day, and he fails of payment; but where the party cannot be compensated in damages, it would be against conscience to relieve; and that was the reason of the judgment in *Fry* and *Porter's* case; where the daughter having married without such consent as by the condition was required, the non-performance of that condition could not be compensated in damages. (2)

Sufficient if the intent of a condition be performed though not the words.

As to what has been objected, that the plaintiff in this case is by his father's will made tenant for life only, whereas by the condition he was to have had a greater estate; he conceived, that was well enough, and better answered Mr. *Rogers's* intent, than if the condition had been literally performed; and declared, that if the substance of the condition in this case was performed, it should serve turn. (3) But

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(1) So *Grimston* v. Lord *Bruce*, Salk. 156. And it seems to be considered as a general rule in equity, that no advantage shall be taken of a penalty or forfeiture where compensation may be made, *Bertie* v. *Falkland*, Salk. 232. Max. Equity, 44, 45. And see this doctrine recognized at law in *Wyllie* v. *Wilkes*, Doug. Rep. 522. Perhaps it is upon a principle analogous to this that equity will not compel a specific performance where damages for non-performance are all that justice requires, Mitf. Tr. 109. Et vide *Cud* v. *Rutter*, 1 P. Wms. 571., and cases cited in note. But where there cannot be compensation in damages there must be performance, even in case of condition subsequent, *Fry* and *Porter's* case, 1 Mod. 300. So as well in conditions precedent as subsequent, *Hayward* v. *Angell*, post 223. *Woodman* v. *Blake*, post 2 vol. 222. 1 Eq. Ca. Ab. 108. pl. 2. And at law, though in grants estate shall not be till condition precedent be performed, yet otherwise it is in a will, for the will shall be guided by intention of the party, *Jennings* v. *Gore*, Cro. Eliz. 219, pl. 7. So though the law is strict against estates at common law, which are to arise on conditions precedent, that never are performed, yet it is not so in limitation of uses, where the intent is to guide the estate, no more than in devises, Lord *Buckhurst's* case, Moor, 519., cites it as adjudged in Lord *Paget's* case, 31 Eliz.

(2) In conditions in restraint of marriage and gift over, it is the circumstance of the legacy being given over, and vesting in a third person which has induced the court to suffer the condition to take effect, and not the intention, *Wheeler* v. *Bingham*, 3 Atk. 364.

(3) If the condition be performed in substance, although different in words, it is good, Co. Lit. 206 *a*. 1 Rol. Ab. Tit. Cond. 426, pl. 2, 4. Vide *Wood* v. *Worsley*, 2 H. Blackstone, 581. Et *Worsley* v. *Wood*, in Error, 6 Term Rep. 719, 722. In the judgment in this case in the Court of Common Pleas, on which the error was brought, it seems as if the Chief Justice and two of the other Judges thought that supposing the condition was a condition precedent, there had been a performance *cy pres*. Et vide Fonbl. Tr. on Equity, Book I. ch. 4. s. 10. ch. 6. s. 1, 2, 3, 4. 5 Vin. Ab. Tit. Condition, Bac. Ab. 1. Tit. Condition (1) 640. Com. Dig. 3. Tit. Condition, B. and C.

as to the quantity of the estate left the plaintiff by his father's will, if that should prove deficient in value, it might make a new case, and therefore ordered a Master to examine the value of the estate devised, and the amount of the debts, which that estate was charged with, and to report to the court, whether after debts paid there would be two full thirds of Sir *Francis Popham's* estate, which was settled upon him in marriage, left to the plaintiff; and also in the mean time to proceed to take the defendant's accounts. (1)

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(1) Reg. Lib. 1682. B. fol. 154. This case is mentioned by the name of *Topham* v. *Rogers*, by Lord *Holt*, in *Bertie* v. Lord *Falkland*, 12 Mod. 184. Salk. 231.

BOVEY *versus* SMITH.

Case 74.

14 *Novembris. In Court. Lord Chancellor.*

Eq. Ca. Ab. 256. pl. 5 384, pl. 3. 2 Ch. Ca. 124. S. C.

Vid. ante Case 58, *post Case* 139.

THIS day this cause came again to be reheard; and the matter insisted on by the defendant's counsel was not, that the judgment was erroneously given at the former hearing, but they endeavoured to vary the case, *Lord Chancellor* declaring he did not see what they could object against the decree at the former hearing, and that he was the more established in his opinion, having, since that decree pronounced, discoursed with the Lord Chief Justice *North*, who concurred with him in opinion. He told them it was *Littleton's* case, where a *disseisor aliens*, and a descent is cast, and afterwards the disseisor repurchases the estate; in that case the disseisee may re-enter. And so where a man wrongfully possesses himself of my goods and sells them in a market overt, if he afterwards buy these goods again, I may seize them in his custody. That in this case the fine had not destroyed the trust; for a fine being but a conveyance did not extinguish or separate the trust from the land, but transferred them both together. (1)

Lit. S. 395. 1 Inst. 242 a.

Fine levied by a trustee, and five years past, does not destroy the trust nor separate it from the land, but transfers them both together.

But the counsel for the defendant would have it that the intent of the devisor was to pass a fee to the daughters, but the will being in *Dutch*, they had not there the word *heir* in use amongst them; but a devise to children and their children according to their customs passed a fee: in this

(1) But fine and non-claim will bar a trust, if levied by a stranger, sic dict. *Woolston* v. *Alston*, Hard. 512.

BOVEY v. SMITH. [85]

case the testatrix had devised the writings belonging to the estate, and in all other parts of the will where she had devised the writings, she had passed a fee, and insisted on the words in the will *(houses purchased with my capital)* as, that these words imported a fee; and it was further insisted that in this case, the plaintiff as reversioner came too soon, some of the daughter's children being living, and to prove that, they had the living exhibits here in court.

But it was answered, that the words, *purchased with my capital*, signified nothing as to the greatness of the estate devised, but she being a feme covert, and trading as a feme sole, those words were only to express, that she had purchased those houses with the money she had got by her separate trade; and as to what was objected, that in *Dutch* they never use the word *heir*, that signifies nothing, for a will that concerns land in *England* must be so framed as by the law of this realm is required for the passing of estates (1), as has been several times resolved in cases of *Latin* wills, and the like: and the defendant's counsel had answered their own objection, by another objection they made, that in other parts of the will where she had devised the writings, she had devised a fee, whereby it appeared she was not ignorant how to have devised a fee (as they would have it she was) if such had been her intent; and as to the objection of the grand children being living, it was said that the will as to them was idle and void, it being *to such of her daughters as should be living at her decease, and to the children of the survivor of them.*

Wills in *Latin* or *Dutch* must be so framed as to pass an estate according to the rule of our law.

Then an objection was started by the court, *viz.* that the testatrix having by deed in her life-time settled the premises to such uses as she should appoint, and in default thereof, to her five daughters (2) and their heirs, therefore if a fee does not pass to them by the will, but only an estate for life, yet the reversion passed by that deed; for where a man has a power of appointing a fee, he may execute it at several times, and appoint an estate for life at one time, and the fee at another time. (3)

A power of appointing a fee may be executed at several times, *viz.* at one time to pass an estate for life, and the fee at another.

(1) Vide post 147. S. C.

(2) [Her *four* daughters, *and the plaintiff her son*, and their heirs. Note from R. L. ante, p. 61.]

(3) So *Snape* v. *Tourton*, Cro. Car. 472, Sir *William Jones* Rep. 392, S. C. where *lease for years* made by appointor, but difference taken where lease for life, 2 Rol. Ab. Tit. Power (c) 263, pl. 35, et ibid. Tit. Trial (B) 701, p. 40, where said such a lease suspends his power as to the fee.

In answer whereunto it was said, that she having by her will appointed an estate for life only to four of the five daughters that were to take the fee for default of appointment, that shewed her intent, that they should not take a fee, and was an implicit appointment of the fee to the plaintiff her heir. And it was agreed, that this objection was of weight, and therefore the council prayed a day to be heard to it, which was ordered accordingly. (1)

BOVEY v. SMITH.

(1) Reg. Lib. 1682. A. fol. 273.

GRAY & *Ux.* *versus* BULL.

Case 75.

17 *Novembris.*

In Court.

Lord Chancellor.

Bill to be relieved against a release, as gained by fraud; it appeared there had been another release given; and though it was said, *that* was got in the same manner, yet not being taken notice of in the bill, nor relief prayed against it, bill was dismissed.

THE bill in this case was to be relieved against a release, setting forth that *Bull* the late husband of the defendant, being possessed of a great personal estate, to the value of 6,000*l.* and upwards, devised the same to be equally divided between the defendant, (his widow) and his daughter, now the plaintiff's wife; but that the defendant concealing the value of this estate, got from her daughter a release of all her interest in the said estate for 350*l.* alleging that her part of the estate came to no more; and therefore to have an account, and be relieved against this release, was the bill.

But it appearing, that the plaintiff *Gray* was only a second husband to *Bull's* daughter, and that her former husband had released, it was objected that the plaintiff in this case could not be relieved; although it was insisted for the plaintiff, that the second release was grounded on the same bottom with the former, and was for the same reason fraudulent, the value of the estate having been in both cases concealed; and that the release given by the plaintiff's wife's former husband was upon little or no consideration: to which it was answered, that the second release was upon very good consideration, for it was upon receipt of the remaining part of the said 350*l.* (1) and a release given on the completing

(1) The consideration stated in the bill was 20*l.* paid down, and 330*l.* secured by the bond of the defendant, R. L.

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payment is as valid, and upon as good consideration, as a release given upon immediate receipt of the whole: but in this case, if the second release was fraudulent or avoidable, yet it cannot be avoided by the plaintiffs, for they have no bill to be relieved against this second release, the plaintiff's bill taking notice of nothing but the first release, and thereupon the bill was dismissed. (1)

(1) This does not appear in the decrée in the Register's Book. The words of the decree are, "Whereupon, "&c. the court declared they saw no "ground to set aside the plaintiff's "said release, the same not appearing "to have been obtained by fraud, col- "lusion, or undue practices, and there- "fore no ground to give relief," and so dismissed the bill, Reg. Lib. 1682. A. fol. 60.

Case 76.

IZRAELL *versus* NARBOURNE.

17 *Novembris. At the Rolls. Master of the Rolls.*

Eq. Ca. Ab. 72. pl. 6. S. C.

Bill to be relieved against a bail bond assigned by the sheriff by fraud. Plaintiff in the action at law must be made a party.

THE bill was to be relieved against a bail bond, setting forth, that the defendant the sheriff by a fraudulent practice had been prevailed upon to return a *cepi corpus* a year after the defendant in the action at law was dead; and though he was not amerced for not having the body at the day, yet had by a combination with the plaintiff at law assigned this bond; and now a suit was commenced at law in the defendant's name: all which was fully made out by proof; yet forasmuch as the plaintiff in the action at law, to whom and for whose benefit the bond was assigned, was not made a party, *the Master of the Rolls* refused to relieve the plaintiff in this case, and the rather for that he having made the plaintiff at law a party to his bill, had never served him to answer; (though if he had not been named a party, the defendant the sheriff might have demurred) but ordered the plaintiff at law to be brought to hearing, and continued the injunction in the mean time.

Case 77.

17 *Novembris. At the Rolls.*

GODDARD *versus* KEATE.

Eq. Ca. Ab. 47. pl. 7. post 2 vol. 17. S. C.

Lessee, where there is a covenant by him to repair, makes an under lease to *J. S.* who is in possession. (1) Under lessee not liable to this covenant in law, nor bound by it in equity, unless the first lessee is insolvent.

[*88]

THE effect of the bill was, that the plaintiff, lord of a manor in the west, had, according to the custom there, made a lease to the defendant's late husband for 99 years, if three lives lived so long, and in the lease *there was a covenant that the lessee should repair: that the defendant's late husband had made a lease for ten years to trustees in trust for his wife the defendant, if she lived so long: that the defendant was in possession, and the premises being much out of repair, the plaintiff had brought an action at law against the defendant on the covenant; but she shewing that the estate in law was in trustees, the plaintiff was forced to be nonsuited, and therefore that she receiving the profits might be compelled in equity to repair, was the bill.

For the plaintiff it was argued, that where a man makes a lease rendering rent, if the lessee assigns to a beggar or insolvent person, in equity the lessee shall be bound to pay the rent, (2) which was a common case, and in parity of reason with this case. (3)

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(1) Assignee of a lease, rendering rent, assigns over; he shall be liable in equity for the rent, during the time he enjoyed the land, though in strictness of law there is no privity of contract to charge the assignee, *Treackle* v. *Coke*, post 165.

(2) Because the rent is due by him in respect of the contract, but an assignee is only liable in respect of the thing enjoyed, so a lessee at will is only liable in respect of his occupation, *Eaton* v. *Jacques*, Doug. 460. But where lessor refused to accept an assignee for his tenant, and gave his receipts in the lessee's name, and afterwards brings debt against assignee for rent, it was held good, for he may refuse him when he will, and accept him when he will, and may sue either lessee or assignee for the rent at his election, *Devereux* v. *Barlow*, 2 Saund. Rep. 182. And it is said lessor may have joint action of debt against lessee and assignee, for the whole rent, *Bailiffs of Ipswich* v. *Martin*, Cro. Jac. 411. Sed vide distinction in this respect between action of debt and covenant, *Mills* v. *Auriol*, 4 Term. Rep. 94. As to the authority of *Eaton* v. *Jacques*, vide *Powell's* Law of Mortgages, p. 241. [*Westerdell* v. *Dale*, 7 Term Rep. 312. *Stone* v. *Evans*, cited 7 East, 341.] And note in the case in Cro. Jac. it does not appear that the assignee of lessee was accepted by lessor, but that was not the question in the cause. And it seems it must be on *express covenant*, and that such action does not lie against the lessee upon *covenant in law* (such as the words, "yielding and paying, demise, grant," which are covenants in law both by lessor and lessee) after assignment and acceptance of the assignee, *Batchelor* v. *Gage*, 1 Sid. 447. Sir *William Jones*, 223. *Mills* v. *Auriol*, 4 Term. Rep. 94. Bankruptcy of lessee no bar to an action of covenant, *Mills* v. *Auriol*, ub. sup. [But see now the stat. 6 G. 4. c. 16. s. 75.]

(3) And in no case where express covenant by lessee, and afterwards assignment, and assignee accepted by

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But for the defendant it was insisted, that this was not any assignment of the term, but only a derivative lease, and there was no privity between the first lessor the plaintiff, and the defendant, and therefore she ought not to be charged in equity; but the plaintiff had a proper remedy at law against the executors of the first lessee, who were not made parties, nor brought before the court. If the first lessee had not left assets, then indeed there might be some reason in equity to charge the defendant with this covenant; but where the proper remedy did not fail, the plaintiff shall not be suffered to resort to this extraordinary remedy; and thereupon the bill was dismissed. (1)

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lessor, will the lessee be discharged by the assignment, for where covenant to pay the rent no assignment will discharge lessee of the covenant, *Arthur* and *Van Deplantes* case, Hill. 7Geo. 2. in B. R. 1733. Lib. C. 38. So where covenant not to erect buildings, *Batchelor* v. *Gage*, Cro. Car. 188. So where covenant to repair, *Barnard* v. *Godschell*, Cro. Jac. 309. *Brett* v. *Cumberland*, Cro. Jac. 399, 521. *Norton* v. *Aclane*, Cro. Car. 580. 1 Rol. Ab. 522 (N) pl. 1, 2. *Glover* v. *Cope*, 4 Mod. 82. But an action of covenant is not like action of debt for rent reserved, for if the lessee assigns over his term, and the lessor accept of the assignee, as his tenant, the lessor cannot have an action of debt for the rent against the first lessee, by reason of his acceptance, which hath extinguished the privity of contract, *Waller's* case, 3 Rep. 24. *Marsh* v. *Brace*, Cro. Jac. 334. Better reported 2 Bulstr. 151, 152. *Marrow* v. *Turpin*, Cro. Eliz. 715. Moor 660, S. C. *Quære*, What shall be considered as an acceptance of lessee's assignee? But yet in such case the lessor, after his own acceptance, shall maintain an action of covenant, *Batchelor* v. *Gage*, *Brett* v. *Cumberland*, ub. sup. Et vide *Thursby* v. *Plant*, 1 Saund. Rep. 240, 241. *Fisher* v. *Ameers*, 1 Brownl. 20. And particular notice of assignment not necessary, *Marsh* v. *Brace*, 2 Bulst. 151, 152, the acceptance of rent being sufficient notice in law, and shall bar lessor of his entry, *Whichcot* v. *Fox*, Cro. Jac. 398, 2 Bulst. 290. *Edwards* v. *Morgan*, 3 Lev. 233. *Ashurst* v. *Mingay*, 2 Show. 133. Sir *T. Jones*, 144. Entered *Ashurst* v. *Mingar*, Lill. Ent. 135. S. C. *Chancellor* v. *Poole*, Doug. 765, 3d edit. *Eaton* v. *Jacques*, ibid. 460. *Luxford* v. *Barber*, 1 Term Rep. 92, 95. Et vide note (5) to the above case of *Thursby* v. *Plant*.

(1) There is only a simple order of dismissal without costs, Reg. Lib. 1682. A. fol. 58. So covenant will lie for grantee of reversion, *Ashurst* v. *Mingay*, 2 Show. 133. Sir *T. Jones*, 144. *Edwards* v. *Morgan*, 3 Lev. 233. And as well of copyhold as freehold lands, *Glover* v. *Cope*, 4 Mod. 82. But it did not lie at the common law, but was given by 32 Hen. 8. cap. 34. *Thrale* v. *Cornwall*, 1 Wils. 165. See that stat. and also Bac. Abr. tit. Covt. E (6) vol. 2. p. 75. Et vide Co. Litt. 215 *a*. And covenant to renew will lie for assignee of the term against the grantee of the reversion, arg. *Barker* v. *Dormer*, 1 Show. 194. *Isteed* v. *Stonely*, 1 Ander. 82.

FOUKE *versus* LEWEN.

Case 78.

15 *Novembris.*

In Court.

Lord Chancellor.

Eq Ca. Ab. 156. pl. 10.

A man marries an orphan, who dies under twenty-one. Her orphanage part shall not survive to the other children, but shall go to the husband.

THE bill was to have an account of a citizen's personal estate, and to be let into the orphanage part, the plaintiff having married a citizen's daughter. And the chief point of the case was, whether the other children of *Lewen* the citizen were so advanced by him in his lifetime, as to exclude them of their orphanage part. (1)

Per Curiam any provision made by the father in his lifetime for his children is an advancement within the custom, (2) unless it be declared by writing that they are not [89]

(1) In this case it appears that *Edmund Lewen*, the citizen and father in law of the plaintiff, was in his lifetime possessed of a very large personal estate to the value of 100,000*l.* and that his daughter, the wife of the plaintiff, (who, upon her death, sued by bill of revivor) had married the plaintiff without the consent of her father, and that after her marriage her father had given to her some sheets, table linen, and wearing apparel, and also had allowed her for about six months before his death 20*s.* a-week, and by his will had given her an annuity or *rent charge* of 50*l.* per annum for her life, and on these gifts and legacy the question arose whether they were a sufficient advancement to bar her, and of course the plaintiff, from her part of the orphanage share of the said citizen's personal estate. And it was decreed they were not such an advancement, and an account of the said personal estate was also decreed, Reg. Lib, 1682. A. fol. 164. *N. B.* No mention appears of bringing the amount of the money and other things received by the plaintiff's wife into hotch-pot. A legacy given by a freeman to his child shall not go in satisfaction of the customary part, unless it appear to be the intention of testator that it should do so. *Ireton's* Case, 2 Freem. 28. Nor shall freeman's child be barred by implication, *Bravell* v. *Pocock*, ibid. 67. But where legacy is declared to be in satisfaction the child must waive it, if he will claim under the custom, *Anon.* Hill. 1706. 7 Vin. 214. pl. 10. *Hervey* v. *Desbouverie*, Forr. 136. *Morris* v. *Burroughs*, 1 Atk. 104. *Pugh* v. *Smith*, 2 Atk. 43. *Car* v. *Car*, ibid. 278. *Secus* if the father dispose of his testamentary part only, ibid. and cases there cited: but he is not obliged to elect till after account taken, *Hender* v. *Rose*, cited in *Cowper* v. *Scott*, 3 P. Wms. 124.

(2) The advancement to exclude a child must be in consideration of marriage, and no case where a sum of money given by a freeman to his daughter, on any other consideration is a bar of the orphanage share, per *Master of the Rolls*, in *Hume* v. *Edwards*, 3 Atk. 452.* And note the

* The decree in this case, as stated in the register's book, directed the plaintiffs to elect whether they would take under the custom or will, and if the former they were not to be entitled to the legacies given by the will. And the master was ordered to take an account of what sums of money, goods, or effects the plaintiff had received from the testator, and see which of them were paid or given to the plaintiffs by way of recompence and satisfaction for the expenses and trouble they were put to, by reason of the testator and his family's visiting

FOWKE v. LEWEN.

sufficiently advanced, (3) and for some time it was held that in such writing there must be mention made what sum

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Recorder's Certificate in *Chace* v. *Box*, Eq. Ca. Ab. 154. pl. 3., is cited by the *Master of the Rolls* as to that effect, but the certificate as there stated does not appear to go to that point, and it must be by way of portion in marriage, or *to set up in the world*, per Lord Chan. in *Elliot* v. *Collier*, 3 Atk. 528. Et vide *Jenks* v. *Holford*, ante, 61. It is stated, indeed, to be a general rule that all sums of money given by a freeman of *London* to his child must be brought into hotch-pot, *Hedges* v. *Hedges*, Pre. Ch. 269. *Jenks* v. *Holford*. *Hume* v. *Edwards*, ub. sup. But this rule is subject to exceptions, as where an only child in part advanced, he shall not bring his portion into hotch-pot. The *Queen* v. *Rogers*, Salk. 426. *Fane* v. *Bence*, post 2 vol. 231. *Wood* v. *Fettiplace*, 17 Jac. 1. Cited in *Deane* v. Lord *Delaware*, post 2 vol. 629. *Stanton* v. *Platt*, post 2 vol. 754. *Maggot* v. *Smith*, Tr. 1716. Vin. Tit. Cust. Lon. (B 6) Ca. 19. Et vide *Stanley* v. *Norcliffe*, Tr. 1717. 7 Vin. Ab. 215. pl. 13. And there seems also to be a clear distinction between moneys expressed to be advanced in part of fortune, though of small amount, and petty sums of money not given as a portion, but by way of presents, those in the former case to be taken as an advancement, and brought into hotch-pot, and in the latter case not. *Morris* v. *Burroughs*, 1 Atk. 403. *Elliot* v. *Collier*, 3 Atk. 527. So money laid out and allowed for education, or in travelling, or in putting out child apprentice no advancement, *Hender* v. *Rose*, cited in note. *Pusey* v. *Desbouverie*, 3 P. Wms. 317. So in maintenance of child, *Edwards* v. *Freeman*, Eq. Ca. Ab. 249. pl. 10. 2 P. Wms. 435, cited in *Elliot* v. *Collier*, 3 Atk. 528. And quære, whether maintenance and support of a daughter after marriage would be considered as an advancement, *Elliot* v. *Collier*, ub. sup. And note in a MS. note to *Edwards* v. *Freeman*, with which the editor has been favoured, it appears that the decree in that case was appealed from to the Lords, but that before the appeal was heard a will was found, which directed the same thing as had been decreed. But money laid out for procuring establishment in life shall be brought into hotch-pot, *Elliot* v. *Collier*, ub. sup. as in purchasing an office or a commission in the army, *Norton* v. *Norton*, cited in note in *Pusey* v. *Desbouverie*, ub. sup. and *that* where it did not appear to have been paid as a portion, *Hearne* v. *Barber*, 3 Atk. 213. Sed vide the next note (3); which also see as to the law called Jud's law. And note that as to children advanced in their father's lifetime, bringing such their advancement into hotch-pot that was to be only in the case of a total intestacy, or where the whole personal estate became distributable, per curiam, *Cowper* v. *Scott*, 3 P. Wms. 124. But in the case of real estate being settled by the father on an heir or co-heir this will be no bar to the orphanage part, even though the father should declare it to be a full advancement, *Cevill* v. *Rich*, post 181, and 216, and 2 Ch. Ca. 160, under the name of *Rich* v. *Rich*. So money given to be laid out in land no advancement, *Annand* v. *Honeywood*, post 345. 2 Ch. Ca. 179, 186. S. C.

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them, or for journeys taken by the plaintiffs or either of them for the testator, and such of the moneys as the master should find were not so paid or given to the said plaintiffs, by the testator, by way of recompence and satisfaction, as aforesaid, were to be brought by the said plaintiffs into *hotch-pot*. The defendant *Edwards* and his wife to bring in the 2,000*l.* advanced, and 2,000*l.* secured by the bond; but not for the four East India bonds. The master to enquire whether *Edwards* laid out more money in the purchase, and whether he had been repaid, or else he was to come in as a creditor on the testator's estate. Reg. Lib. 1746. A. fol. 574.

they received from their father, because of bringing it into *hotch-pot*. (1)

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But it was insisted that the plaintiff's wife being dead, and she dying before the age of *twenty-one*, her husband not

Vid. post Case 213.

Babington v. *Greenwood*, 1 P. Wms. 533. *Hume* v. *Edwards*, 3 Atk. 450. And no difference whether land be given as an advancement or come by devise or descent, *Stanton* v. *Platt*, post 2 vol. 754. So as to the general doctrine of land on this head, *Cox* v. *Belitha*, 2 P. Wms. 274. *Secus* as to leasehold estates, ibid. And it appears that lands of inheritance, if given by freeman, and accepted in bar of orphanage part, will bar in equity, at least the child cannot have both, ibid.

(3) *A.*, the freeman's son, was by the freeman's will mentioned to have had 400*l.* in full of his orphanage part by the custom, and he afterwards received further sums of money amounting to 600*l.* from his father, the freeman, and the certainty thereof appeared by his own answer, yet these sums, with the 400*l.* being brought into hotch-pot, would not bar his orphanage part, *Northey* v. *Strange*, 1 P. Wms. 342. But where the father, (being dead intestate) had given several sums of money to his son, who had not been married, *as an advancement*, upon the hardship of the case, as it would, in effect, be excluding him from receiving any thing from his father, *Hardwicke*, Lord Chan. held, that he might come in without bringing the money so received by him as an advancement into hotch-pot, *Hearne* v. *Barbar*, 3 Atk. 213.* And where portion brought into hotch-pot, it is to be brought into the orphanage part only, and not into the general personal estate of freeman, *Beckford* v. *Beckford*, post 345. *Cleaver* v. *Spurling*, 2 P. Wms. 526. But where freeman gave a bond to his mother to be paid after his death it shall be paid out of his whole estate, and not out of the customary part only, *Strode* v. *Gibbs*, Pre. Ch. 51. Yet where loss happens by insolvency of executor, it shall be borne out of the testamentary part, and not out of the whole personal estate, *Read* v. *Duck*, Pre. Ch. 409.

(1) 1 Chan. Ca. 181. 2 Vent. 340. By the custom of *London* it is not the value of the advancement that is necessary to appear with certainty, but the thing advanced; vide order stated in *Blunden* v. *Barker*, 1 P. Wms. 647. And the father's declaring the child to be fully advanced or not, is of no avail, unless it appears what the advancement is, sic dict. arg. *Deane* v. Lord *Delaware*, post 2 vol. 630. And proof read in *Cleaver* v. *Spurling*, 2 P. Wms. 527. Et vide certificate of the custom stated in *Chace* v. *Box*, Eq. Ca. Ab. 155. pl. 3. *Northey* v. *Burbage*, Pre. Ch. 470. *Quære*, whether the *quantum* of portion or advancement need appear under the father's own hand, if it be otherwise sufficiently authenticated, as by his books of account kept by his servant, &c. Vide *Blunden* v. *Barker*, 1 P. Wms. 642., and note there by Mr. *Cox*.

* The case of *Hearne* and *Barbar* is entered Reg. Lib. 1744. A. fol. 206. From the statement there, it appears there were five children, *Sophia Hearne*, *James Barbar*, *John Barbar*, *Peter Barbar*, and *Adam Barbar*. *James* waived any claim. *John* being married and advanced 200*l.* admitted to be advanced by agreement with the mother of his wife, after his marriage, and the certainty of the said *John Barbar's* advancement not appearing under the father's hand, declared *John* to be taken to be fully advanced by his father in his lifetime, and therefore ordered the orphanage part to be divided into three equal parts, between plaintiff *Sophia*, the plaintiff *Adam*, and defendant *Peter*; they to bring into hotch-pot, as between themselves, all such sums as any of them received of their father in his lifetime, *by way of advancement*, to the end that their respective shares of the orphanage part may be made up equal; account directed.

N. B.—In this case Mrs. *Hearne's* share both of orphanage and legatory part, was, on her consent in court, ordered to be paid to, or retained by plaintiff, her husband.

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having received her share of the orphanage part, her share by the custom did survive, and prayed that the *Recorder* might certify the custom in this particular; and to prove the custom they cited *Pheasant's* case. (1)

But the court rejected this matter; for although if an orphan dies before *twenty-one* years of age unmarried, there may be such custom, yet that custom cannot take place, where the orphan is married, and the interest of her share vested in her husband; and if there was any such custom, it would be unreasonable and void: and *Pheasant's* case is nothing to the purpose; for the husband dying, and his wife's orphanage share remaining in the chamber of *London* the question was, whether it was *debitum* or *depositum*, and whether the widow should have it, or the executors of the husband.

Then they insisted on a clause in *Lewen's* will, recommending his children (whom the plaintiff would have to be fully advanced) to the care of his wife, to provide further for them; and that *that* amounted to a sufficient declaration, that he thought them not fully advanced: but it was answered, that such an implicit declaration would not serve turn; and besides that clause had another meaning, and did work upon the legatory part only.

[90]

Whether any provision made by a freeman for a child, unless upon marriage, or in pursuance of a marriage agreement, be an advancement.

Q. Whether any provision made by the father for his child be an advancement, or whether only such a provision as is made on the marriage of the child. It seems to be only such a provision as is made on marriage, or in pursuance of a marriage agreement. (2)

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(1) The custom is if orphan son dies before twenty-one, and daughter dies before twenty-one, and unmarried, the share in both cases survives, *Jesson* v. *Essington*, Pre. Ch. 207. So even after division and partition made, *Leoffes* v. *Lewin*, Pre. Ch. 372. Eq. Ca. Ab. 156. pl. 8. But the survivorship does not extend to any part the orphan takes himself by survivorship, *Anon.* Pre. Ch. 537. And by the custom the orphan is incapable of devising his part by will before twenty-one, or in case of a daughter before twenty-one, or marriage, *Anon.* Pre. Ch. 537. *Wilcocks* v. *Wilcocks*, post 2 vol. 599. *Knipe* v. *Wale*, Mich. 1721. 7 Vin. Ab. 213. pl. 3. *Hervey* v. *Desbouverie*, Forr. 135. Nor the part he takes by survivorship any more than the original share, ibid. But he may devise his share under the statute of distributions, *Wilcocks* v. *Wilcocks*. *Jesson* v. *Essington*, ub. sup. And if he die intestate after twenty-one, it shall go according to the statute of distributions, *Anon.* Pre. Ch. 537. Et vide stat. 11 Geo. 1. cap. 18. sec. 17. Bacon Ab. Tit. Cust. Lond. (c).

(2) The point of the wife dying does not appear in the register's book.

SAVAGE *versus* SMALEBROKE.

Case 79.

18 *Novembris.*
In Court.
Master of the Rolls.

Defendant demurred, for that plaintiff had made no title by his bill, and also answered several parts of the bill. Demurrer over-ruled by the answer.

THE defendant having demurred, for that the plaintiff had made no title to himself in the bill, (as in truth he had not) Mr. *Hutchins* insisted, that the defendant had over-ruled his own demurrer, by having answered over to several parts of the bill. (1) But the matter of fact being denied, and there being no books in court, the matter was adjourned.

(1) Sic dict. *Jones* v. *Strafford*, 3 P. Wms. 80. Et vide Duke of *Dorset* v. *Girdler*, Pre. Ch. 532.

NOEL *versus* ROBINSON.

Case 80.

20 *Novembris.*
In Court.
Lord Chancellor.
2 Vent. 358.
2 Ch. Ca. 145.
2 Ch. Rep. 248.
S. C.

UPON a re-hearing the case was thus. Sir *Martin Noel*, father of the plaintiffs, being possessed of a great personal estate, and of a moiety of a plantation beyond sea, made his will, 23 *September*, 1665, and the defendant *Robinson* and two others (1) executors thereof, and devised his said moiety of the plantation and of the *negroes* and stock thereto belonging to the plaintiffs *Nathaniel*, *Grace*, and *Elizabeth*, his children, then infants, and directed the executors to receive the profits, and to give an account, and pay the proceeds thereof for the maintenance and education of the plaintiffs.

The defendant *Robinson* only proved the will (2) and took on him the management of the testator's moiety of the plantation, and afterwards made a lease thereof to one *Worsam* for a term of years, and reserved the rent to himself in trust for the plaintiffs' use.

(1) His two sons *Martin Noel* and *Thomas Noel*, since deceased, R. L.

(2) It appears that the other executors joined in the probate, but did not intermeddle, R. L. *Note.*—It is now setttled that where a bill is filed against persons as executors, and one of them says he has not proved nor intermeddled, the bill shall be dismissed as against him, with costs, as being an unnecessary party, *Willis* v. *Walker*, 6th Feb. 1804. In Ch. not reported.

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The plaintiffs brought their bill against *Robinson* the executor and one *Faulconer*, who had purchased of the executor *the said moiety of the plantation for a valuable consideration, that they might account for the profits of the plantation and pay the same to the plaintiffs, that they might convey to the plaintiffs the said moiety of the plantation, and that they might hold and enjoy the same according to the will; they insisting, that the defendant *Robinson* by making the said lease had assented to the devise of the moiety of the plantation to the plaintiffs.

The defendant *Robinson* by answer admitted the will, and his making the said lease and reserving the rent in manner aforesaid; but said, he made the same in such manner without due consideration, and not with intent thereby to assent to the devise to the plaintiffs, and thereby deprive the creditors of their just debts, and exempt the estate therefrom; and that the estate fell short of paying the testator's debts, and he had therefore been forced to sell the testator's moiety of the plantation to the defendant *Faulconer* for 500*l.* which he had applied in payment of the debts. And the defendant *Faulconer* insisted on his purchase.

For the defendant *Robinson* it was insisted, that he was now before the court in three capacities, *viz.* as an executor, as a trustee, and as a creditor to Sir *Martin Noel's* estate. And 1*st*, That this lease at most was but an implied assent; and it might be taken to be done two ways, either as a trustee or as executor; and in this case it ought to be taken as done *quatenus* a trustee; because that way it could work no wrong to any one. But it was insisted, that in truth there was no assent, for that depends upon the intent of the party, and it appears he did not intend to assent to the legacy; for when a lease is specifically devised, if the executor assent, there is no longer any interest in the estate left in the executor; and it appears, that in this case the executor apprehended an estate still remaining in himself, as appears by his selling this plantation, and by other his subsequent acts concerning the same. And it was likewise insisted, that though in law this lease might amount to an assent, yet in equity it should not; and cited several cases, in which this court had mitigated the rigour of the law in relation to exe-

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cutors, and particularly in the matter of refunding legacies, *viz.* the case of *Biscoe* and *Nelthrope*, (1) and the case of *Grove* and *Benson*, (2) and that in this case the defendant had done no more than what in equity he might have been compelled to have done, and his doing of it without the trouble of a suit ought not to be turned to his prejudice. (3)

Then it was insisted that in this case the defendant the executor is to be considered as a creditor to Sir *Martin Noel's* estate; for being an executor, and in disburse for debts by him paid, which were owing by the testator, he is now become a creditor for so much to the testator's estate; and that a creditor shall be relieved against a legatee, that has received his legacy, was settled in the case of *Chamberlayn* and *Chamberlayn*. (4) If an executor assign a term without consideration, and assets fail, the creditors shall follow this estate, into whose hands soever it comes. And in this case an executor who had carried himself fairly, and without exception, and it may be, if he had come to any one here to advise with, he could not have been directed how to have managed himself more prudently, it not appearing, nor was it in the least suspected when he made the lease of the plantation, but that the assets would have answered all debts with a great overplus, which afterwards became deficient by the breaking of two eminent *Spanish* merchants, that dealt in *negroes*, and broke for the value of 200,000*l.* and were then debtors to Sir *Martin Noel's* estate to the value of 30,000*l.* and therefore in a case of such extremity the executor ought to be relieved against the rigour of the law: and they cited the case of *Holt*, the goldsmith, (5) who being an executor had given a recognizance for payment of a legacy, and afterwards the assets becoming deficient to pay the debts by the fire of *London*, he was relieved against this recognizance. And where a fine is ordered to be levied by the decree of this court; if it be so done, as to pass a greater estate, or to operate

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(1) 1 Ch. Ca. 135.

(2) *Grove* v. *Banson*, 1 Ch. Ca. 148.

(3) Vide autem the distinction between an executor, doing a thing voluntarily and by compulsion, with respect to his being indemnified, infra p. 94., and Earl of *Winchelsea* v. *Norcliff*, post 436.

(4) 1 Ch. Ca. 256.

(5) 1 Ch. Ca. 190, and cited *Baden* v. Earl of *Pembroke*, post 2 vol. 57.

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further in law than this court intended, there, though a fine be the most sacred conveyance at law, this court will restrain it to what was the original intention of levying it. (1)

For the plaintiffs it was argued by their council; and 1st, as to the objection that this plantation was a fee simple estate, but by the custom of the country made a testamentary and personal estate in relation to debts only, but was not a personal estate in any other respect, and therefore in this case the executor had no power to assent, as he may where a term is specifically devised; it was answered, that an executor may dispose of a term or of a fee simple estate, that he has in trust for payment of debts, and that this assent amounted to a disposition.

As to the objection, that the defendant *Robinson* in this case is a creditor, *that* we deny; for where an executor pays a legacy that he should not have done, that shall not make him a creditor to his testator's estate: And as to the case of *Hodges* and *Dunkin*, it was not there resolved, that an executor should be relieved upon the voluntary payment of a legacy. As to the objection, that where a thing may be taken two ways, it shall not be construed to do a wrong, they may do well to remember another maxim of the law, that *a man's own deed shall be taken strongest against himself.*

If the spiritual court go about to compel an executor to pay a legacy without security to refund, a prohibition shall go.

Lord Chancellor. There is a difference between a suit for a legacy in this court, and a suit for a legacy in the Spiritual Court. If in the Spiritual Court they would compel an executor to pay a legacy without security to refund, there shall go a prohibition, as was resolved in the case of *Knight* and *Clarke*: (2) but in this court, though there be no provision made for refunding, yet the common justice of this court will compel a legatee to refund. It is certain that a creditor shall compel the legatee to refund, (3) and so shall one legatee compel the other, where the assets become defi-

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A creditor shall compel a legatee to refund, and so shall one legatee another, where assets are deficient.

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(1) So *Goodrick* v. *Brown*, 1 Ch. Ca. 49, cited in *Baden* v. Earl of *Pembroke*, post 2 vol. p. 56. And a fine shall be avoided when obtained *malâ fide*, sic dic. arg. *Sawyer* v. *Vernon*, post 383. So this court will relieve against conveyance by deed and fine gained without consideration and indirectly, *Wilkinson* v. *Brayfield*, post 2 vol. 307.

(2) But legatees are not now obliged in this court to give security to refund in case of deficiency of assets, *Anon.* 1 Atk. 491.

(3) *Hodges* v. *Waddington*, Term. Pasch. 35 Car. 2. 2 Vent. 360. *Anon.* post 162. *Newman* v. *Barton*, post 2 vol. 205.

cient: (1) but whether the executor himself, after he has once voluntarily assented unto a legacy, shall compel the legatee to refund, is *causa primæ impressionis:* (2) and it must be allowed that there is a great difference between a voluntary assent, and where the executor was compelled to assent. (3) We know the common case, if a man voluntarily pays money to a bankrupt, after he becomes a bankrupt, it is in his own wrong, and he may be forced to pay it again; but otherwise it is, if the bankrupt recover it against him by course of law: and a small matter shall amount unto an assent to a legacy; an assent being but a rightful act. (4) Whereupon the *Lord Chancellor* confirmed his former decree, and the plaintiff's bill was dismissed. (5)

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Whether an executor, after he has voluntarily assented to a legacy, shall not compel the legatee to refund. A debt voluntarily paid to a bankrupt shall be paid over again. Otherwise, if recovered by course of law. A small matter will amount to an assent to a legacy.

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(1) The distinction is between the cases where there was originally a deficiency of assets, and where the executor had wasted them. In the former case a legatee who has been paid more than his proportion must refund, but in the latter the legatees who have received their legacies have received no more than they were entitled to, and the executor is therefore the only person to be resorted to, *Walcot* v. *Hall*, 23d Feb. 1788. [2 Bro. Ch. Rep. 305.] Cited *Anon.* 1 P. Wms. 495, in note. Sed vide *Orr* v. *Kaimes*, 2 Vez. 194. And even in case of original deficiency the court conceived that where executor voluntarily paid the full legacies, neither the executor nor any of the other legatees should compel a refund, contra if the legatee had recovered his legacy by decree, *Newman* v. *Barton*, post 2 vol. 205. Sed vide *Anon.* 1 P. Wms. 495. But he must refund if deficiency is created by debts, which did not appear till after payment of the legacy, *Nelthrop* v. *Hill*, 1 Chan. Ca. 136.

(2) A bill filed by executor against legatee, after assenting to the legacy was dismissed, for that an executor shall not be admitted to undo his own assent, *Hodges* v. *Waddington*, 2 Vent. 360.

(3) So if trustees for an infant would, with the profits saved out of infant's estate purchase lands, adjoining to infant's estate, the court, on application, will enable them to make such purchase, and indemnify them therein, but if they do it voluntarily, and of their own heads, and afterwards the infant dies within age they are accountable to the infant's executors for the money they shall have so applied, Earl of *Winchelsea* v. *Norcliffe*, post 435.

(4) 2 Vent. 358, and executor compelled to assent in the spiritual court, and when once given cannot be retracted, Wentworth, Off. Executor, 227. So assent of one executor shall bind all, sic dict. *Southward* v. *Millard*, March. 136. So an assent by infant executor shall bind the other, ibid. Et vide 4 Burn. Eccl. Law, 321.

(5) Not so, the case is stated with sufficient accuracy, but the decree was, "That by the lease to *Worsam*, the "defendant had assented to the plain- "tiffs' legacy given to them by the "will of their father, and that the de- "vise by the said will was a good de- "vise, and that the plantation and stock "did well pass thereby, and that the "said act of the defendant *Robinson* "being voluntary, he put the said es- "tate out of the power of the creditors "of Sir *Martin Noel*, or of any ad- "ministrator *de bonis non* of him, and "that therefore the defendants should "assign the said moiety of the planta- "tion and stock thereto belonging, to "plaintiffs, and that they should have

NOEL v. ROBINSON.

Note.—This cause was three times heard before the Lord Chancellor *Nottingham*, and a decree pronounced by him for the plaintiff, and twice confirmed. And on 25 *Junii*, 3 *Jac.* 2. this cause was reheard by the Lord Chancellor *Jefferies*, who reversed the Lord Keeper *North's* decree, and affirmed the decree made by the Lord Chancellor *Nottingham*. (1)

An executor makes a lease rendering rent, his administrator shall have the rent, and not the administrator *de bonis non.*

In the arguing of this case, was cited the case of *Davie* and *Drew* alias *Drewry*, (2) in which it was resolved in the *King's Bench*, and afterwards in this court, that where an executor makes a lease rendering rent, his administrator shall have it, and not the administrator *de bonis non.*

"the counterpart of *Worsam's* lease, "and that *Worsam* should henceforward pay the rent to the plaintiffs, "and an account of profits decreed "against defendant *Robinson*," Reg. Lib. 1681. B. fol. 643.

(1) The decree for plaintiffs, after declaring that the plantations and stock in question were not subject to the debts of Sir *Martin Noel*, and after reversing the order of Lord Keeper *North*, and confirming the order of Lord *Nottingham*, orders, "That the "defendants *Robinson* and *Faulkner*, "(the assignees of *Worsam's* lease) "should assign the premises in ques- "tion to the two senior six clerks, subject to the order of the court, and "that the arrears of rent due, and also "the growing rent should be brought "into court, except one year's rent for "the present support of plaintiffs, and "that defendant *Robinson* should account with plaintiffs for the rents "and profits of the said plantation received by him, or by his order, from "the death of Sir *Martin Noel*, with "allowance for all payments made by "him, said defendant, for the plaintiffs' "use, together with all just allowances," Reg. Lib. 1686. B. fol. 679.

(2) *Drew* v. *Baily*, 1 Vent. 275. S. C.

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WAGSTAFFE *versus* BEDFORD.

Case 81.

20 *Novembris. In Court. Lord Chancellor.*

THE bill being to have a discovery and account of money received by the defendant, on the behalf of one who became a bankrupt, the defendant pleaded he received it only as a menial servant to the bankrupt, and had accounted for it to him already, and that the Commissioners had already examined him on interrogatories. The plea over-ruled. (1)

Eq. Ca. Ab. 6. pl. 5. 2Vent.358. S.C.

Bill for an account of money received for one who became a bankrupt. Defendant pleaded he received the money as a menial servant to the bankrupt and had accounted for it to him. Plea over-ruled. *Vid. post Case* 127 & 204.

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(1) Reg. Lib. 1682. B. fol. 83. Vide *Anon.* post 136. *Potts* v. *Potts*, post 208. Et sic dict. arg. as between master and servant, *Harrison* v. *Hart*, Com. Rep. 410, 11. Et vide *Cary* v. *Webster*, Str. Rep. 480.

Case 82.

20 *Novembris.*
In Court.
Lord Chancellor.

BOWYER *versus* COVERT.

Eq. Ca. Ab. 73. pl. 12. S. P.

No good cause of demurrer that an executor is not a party, when plaintiff alleges in his bill, he knows not who is executor, and prays defendant may discover him.

THE defendant had demurred for want of proper parties, one of the executors not being made a party; and the demurrer was over-ruled, because the plaintiff had alleged in his bill, that he knew not who was the other executor, and prayed that the defendant might discover who he was, and where he lived. (1)

(1) Vide *D'Aranda* v. *Whittingham*, Mose. 85.

Case 83.

21 *Novembris.*
In Court.
Lord Chancellor.

HUSBANDS *versus* HUSBANDS.

2 Ch. Ca. 127. S. C.

Devise of 400*l.* to be laid out in finishing a house. Testator lives to lay out as much himself, but leaves the house unfinished. The 400*l.* shall not be laid out. (2)

THE case appeared to be thus. A man intending to build a seat upon his estate, and having laid the foundation of it, made his will (which in time was a little after the making of the act of *Frauds* and *Perjuries)* and by his will devised land for raising portions for his younger children, and paying of his debts; and appointed that 400*l.* should be laid out in perfecting the building of his house. (1)

(1) Testator, by his will, devised to the plaintiff, his son, all his timber and other wood, and materials for building which he should have at the time of his death for the building of his mansion house at *East Somerton*, and willed that the plaintiff should have all arrears of rent and interest money due to him at his death, and for the better enabling him to finish the house by him begun, he thereby devised to him 400*l.* more *to be paid out of his personal estate*, and after his debts and legacies paid he devised the residue of his personal estate to be equally divided amongst his children, R. L. Vide *Fryer* v. *Morris*, 9 Ves. 360, at the Rolls.

(2) The principles that govern the doctrine of ademption seem to govern two classes of circumstances only, the 1st class, including all those under which it may appear that the testator did not intend the legatee should take any benefit by the bequest, and the 2d, All those under which it may be presumed that the testator, by acts of his in his lifetime, considered the individual bounty intended to be given by the will, as already anticipated and completed, as to both which, it appears to be clearly held, that an intention on the part of the testator to deprive his legatee of the benefit of his legacy, or to have satisfied him, must plainly appear, and that no particular act which does not of itself declare plainly one or other of those intentions will do, e. g. the calling in by testator in his lifetime of a debt bequeathed by his will, Earl of *Thomond* v. Earl of *Suffolk*, 1 P. Wms. 463. *Orm* v. *Smith*, post 2 vol. 681. *Baugh* v. *Read*, 1 Ves. jun. 264. *Cole-*

HUSBANDS v. HUSBANDS.

It happened, that he lived several years after the making of this will, and in that time expended upon his house above 400*l.* although he left the same unfinished, and died, leaving such will as aforesaid: but the same was defective, as to the passing of the lands intended to be passed thereby, for not being subscribed by witnesses according to the said Act of Parliament.

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It was now insisted by the counsel for the younger children, that the heir at law ought to have no benefit of the 400*l.* by the will appointed to be laid out on this house. 1*st.* because the testator himself, after the making of this will, had expended above that sum on the house; and instanced in some cases of the like nature, where it had been so decreed. 2*ndly*, the testator's intent appearing and plainly expressed

Whether personal estate shall be lessened in prejudice of younger children to make good a direction in the father's will for the benefit of the eldest son, when he at the same time takes advantage of a defective execution of the will, and defeats the father's intention in favour of his younger children.

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man v. *Coleman*, 2 Ves. jun. 639. *Innes* v. *Johnson*, 4 Ves. 571, and cases respectively there cited. As to the distinction taken under the first class of circumstances in respect of a debt bequeathed between the debt being paid in voluntarily, and called in, that distinction was formerly made, but now said to be exploded, vide *Rider* v. *Wager*, 2 P. Wms. 330, and cases cited in note there, *Innes* v. *Johnson*, 4 Ves. 571. But quære, if the court would not under circumstances, listen to such a distinction now, *Coleman* v. *Coleman*, 2 Ves. jun. 640? [See as to this *Barker* v. *Rayner*, 5 Madd. 208, and cases there cited, particularly *Fryer* v. *Morris*, 9 Ves. 360. *Le Grice* v. *Finch*, 3 Mer. 50.] If the deduction above drawn be correct it is evident that each case under the head of ademption must be decided upon the circumstances governed by the above-mentioned principle, and also as to the second class of circumstances, with reference to another principle, namely, that this court leans against double satisfactions, distinguishing, however, between the cases of a legacy a portion and a debt. The leading cases in the first class are, Earl of *Thomond* v. Earl of *Suffolk*, 1 P. Wms. 461. *Crockat* v. *Crockat*, 2 P. Wms. 164. *Rider* v. *Wager*, 2 P. Wms. 328. *Ford* v. *Fleming*, 2 P. Wms. 478. *Ashton* v. *Ashton*, 3 P. Wms. 386. *Lawson* v. *Stitch*, 1 Atk. 507. *Jefferys* v. *Jefferys*, 3 Atk. 120. *Drinkwater* v. *Falconer*, 2 Ves. 623. *Hambling* v. *Lister*, Amb. 401. *Attorney-General* v. Lady *Downing*, Amb. 571, and cases cited therein respectively. [See also *Simmons* v. *Vallance*, 4 Bro. Ch. Rep. 345. *Roberts* v. *Pocock*, 4 Ves. 150. *Chaworth* v. *Beech*, 4 Ves. 555. *Kirby* v. *Potter*, 4 Ves. 748. *Raymond* v. *Brodbelt*, 5 Ves. 206. *Sibley* v. *Perry*, 7 Ves. 522. *Webster* v. *Hale*, 8 Ves. 410. *Deane* v. *Test*, 9 Ves. 146. *Wilson* v. *Brownsmith*, 9 Ves. 180. *Lambert* v. *Lambert*, 11 Ves. 607. *Gillaume* v. *Adderley*, 15 Ves. 384. *Smith* v. *Fitzgerald*, 3 V. & B. 2. *Mann* v. *Copland*, 2 Madd. 223.] Those in the second class are mentioned and arranged in *Bellasis* v. *Uthwatt*, 1 Atk. 426, and the note (2) there. [See also *Freemantle* v. *Bankes*, 5 Ves. 84. *Trimmer* v. *Bayne*, 7 Ves. 508. *Robinson* v. *Whitley*, 9 Ves. 577. *Hartopp* v. *Hartopp*, 17 Ves. 184. *Ex parte Pye*, 18 Ves. 140. *Weatherby* v. *Dixon*, 19 Ves. 407. Coop. 279. *Monck* v. *Monck*, 1 Ba. & Be. 305. *Dwyer* v. *Lysaght*, 2 Ba. & Be. 156. *Thellusson* v. *Woodford*, 4 Madd. 420. *Bell* v. *Coleman*, 5 Madd. 22.]

in his will, was, to have charged his land with several sums of money; but that intent being frustrated by the Act of *Frauds* and *Perjuries*, the heir had a greater benefit thereby, than if the devise had stood good, and the 400*l.* was to be laid out on the house, for his estate is now eased of 1,000*l.* that would have lain upon it, if the will had been good in form; and therefore it would now be very hard for a court of equity to charge the testator's personal estate with this 400*l.* whereby the provision intended the younger children (which was already, by their father's not observing of the Act of *Frauds* in making of his will, very much abridged) would in a manner be wholly defeated.

As to the *first* objection, it was answered, that the testator had a little before his death, and after he had expended such money as they on the other side mention to be 400*l.* declared his intent to be, that whether he lived or died, that work should be perfected; and his usual saying was, that his house should never be called *Mockbeggars Hall.*

As to the *second* objection, they conceived the 400*l.* ought not to be taken away upon that pretence, unless the same had been expressly charged upon the land, which in this case it was not.

But the *Lord Chancellor* decreed against the heir at law, who was plaintiff here in equity to have the benefit of this 400*l.* upon the *first* objection; and so there was no opinion declared as to the second point, though the court seemed to incline against the plaintiff in that also. (1) [97]

(1) The decree as to the 400*l.* is in the Register's Book as follows, "After "directing an account of the testator's "personal estate, the Master is directed "to allow the executors what they laid "out or expended in or towards the "said new building, since the death of "the said testator, and then after de-"ducting specific legacies and child-"ren's portions, and a certain debt of "100*l.* therein mentioned, and if there "should be sufficient after payment "thereof, and the other allowances to "be made as aforesaid, to pay the re-"mainder of the 400*l.* then the same is "to be paid out of the personal estate, "or as far as the same will extend, and "the Master was to direct the pay-"ment thereof accordingly. And the "deeds relating to the real estate "were to be brought into court, on "oath, by defendant's executors, for "the plaintiff's benefit. And if upon "the account therein before directed "after payment of debts and parti-"cular legacies, and the said 100*l.* "and the remainder of the said 400*l.* "given to plaintiff by his father's will, "any surplus should appear, same "should be distributed and propor-"tioned between plaintiff and the said "younger children, and paid to them "by defendants, the executors, ac-"cordingly." Reg. Lib. 1682. A. fol. 145. *N. B.* This case is reported under the name of *Husband* v. *Lulman.*

Case 84.

21 *Novembris. In Court. Lord Chancellor.*

PERKINS & *Al. versus* WALKER & *Al.*

A mortgage after a voluntary settlement with power of revocation, and a will in confirmation of it, is a revocation *pro tanto* only.

One *John Walker* having by a voluntary settlement made himself tenant for life, with a power to lease or grant for a thousand years at any rent, he by deed grants the whole term to trustees, in trust that he himself should enjoy the same during his life, and afterwards in trust, by sale or otherwise to raise out of the premises several sums of money for payment of his debts, and to discharge a mortgage of 200*l.* and other sums, which he appointed to the plaintiffs, his nephews and nieces; which deed was with a power of revocation.

After this, the said *John Walker* having occasion for money, he mortgages this estate three several times to Sir *William Humble*, having before that made his will and confirmed his said first deed, and thereby appointed other legacies to be paid by his trustees.

The point insisted on was, that by these subsequent mortgages to *Humble*, the said *Walker* had revoked his will, and the former deed, that was made with a power of revocation. *Sed non allocatur;* it might be a revocation *pro tanto*, but no otherwise.

A man devises land in fee, and then makes a lease for years of the same land. The lease, if not made to the devisee, is a revocation at law, *pro tanto* only. *Vid. post Case* 133.

And the *Lord Chancellor* cited the case of *Coke* and *Bullock*, 2 *Crook* 49. That a man having by will devised a fee simple, afterwards by indenture makes a lease for years of the same lands; this lease, if not made to the same person, shall be a revocation *pro tanto* only, even at law: and the principal case is much stronger in equity, which will charge and subject an equity of redemption. (1)

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(1) Reg. Lib. 1682. B. fol. 79. Vide *Duppa* v. *Mayo*, 1 Saund. Rep. p. 277 (*n.* 4) *Brydges* v. Duke of *Chandos*, 2 Ves. jun. 417. Earl *Temple* v. Duke of *Chandos*, 3 Ves. 685. *Baxter* v. *Dyer*, 5 Ves. 656, and *Harmood* v. *Oglander*, 6 Ves. 199. 8 Ves. 126. S. C. In which the doctrine of revocation of wills is elaborately discussed, and all the leading cases cited. [*Vawser* v. *Jeffery*, 16 Ves. 519, 2 Swan. 268.] In the case of *Baxter* v. *Dyer*, it was determined that a devise is not revoked by a mortgage in fee to the devisee. So partition merely as such not a revocation, *Attorney-General* v. *Vigor*, 8 Ves. 281. *Quære.* If exchange be not? ibid. Nor is dissesin, ibid. 282.

Case 85.
21 *Novembris.*
In Court.
Lord Chancellor.

BERRISFORD *versus* DONE.

An officer in the army agrees to surrender his commission to *I. S.* in consideration of 200*l.* for which bond is given.

Done, the defendant's son, being a captain of a company in *Ireland*, and growing sickly, and not likely to live long; and the plaintiff being lieutenant of the same company, treated with him to surrender his command, that so he might be advanced in his place; and at last they agreed that in consideration of 200*l.* he should surrender it, and a bond was given for the 200*l.*

The officer surrenders, but *I. S.* is refused the commission. No relief against this bond.

The bill was against the executrix of the obligee, to be relieved against this bond: and upon the plaintiff's proofs in the cause, the case appeared to be thus, *viz.* That *Done* did surrender, but that the Duke of *Ormond* did refuse to accept of the surrender, and would not admit the plaintiff thereon, alleging that *Done* had freely received the place from the Duke, and therefore now *Done* was grown weary of it, and had kept it as long as he thought fit, the Duke would not suffer him to sell it. And the Duke of *Ormond* and his secretary being examined for the plaintiff in this cause deposed to that effect.

The plaintiff's counsel insisted on the disadvantages that would attend the countenancing of such bargains, and the discouragement it would be to gentlemen, that they should not by their continued service raise themselves to preferment; but must either buy the same, or suffer others to jump over their heads, let them have never so well merited preferment.

But for the defendant it was insisted, that the agreement was not to sell an office, but only to do a lawful act, which was to surrender the commission; and this was literally performed; and the said *Done* did not undertake the plaintiff should be admitted upon such surrender; but the plaintiff was to look to that himself; and if he has not profited by this surrender, it was his own fault: and in truth he, finding *Done* a dying man, forbore to get himself admitted in *Done's* lifetime, that he might have this pretence to avoid his bond; and *that* now is the thing that grieves the plaintiff, and occasions this vexatious suit. That the plaintiff was over-hasty to purchase the commission, which, if he had had a little more patience, he might have obtained at an easier rate; but his own improvident bargain can create no equity to himself.

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BERRISFORD v. DONE.

A. agrees to surrender his office to *B.* for 100*l.* for which *B.* gives bond. *A.* surrenders, but *B.* not being qualified is refused to be admitted. No relief for *B.*

And Mr. *Hutchins* cited a case in point, that had been decreed but the last term; where a man contracted with an officer to surrender his place for 100*l.* and gave bond for it; and afterwards the officer surrenders accordingly; but the obligor being not judged fit for the employ by his superiors, could not procure himself to be admitted, and thereupon came into *Chancery* to be relieved against his bond entered into for payment of this 100*l.* but was dimissed.

In the principal case the *Lord Chancellor* decreed for the defendant; but ordered her to accept of her principal money, without either interest or costs. (1)

(1) The editor has been favoured with a note of the case of *Parsons* v. *Thompson*, Hilary 30th Geo. 3d, [reported 1 H. Blac. 322.] in which it is stated that Lord *Loughborough*, Chan. adverting to the principal case, says, "He thinks it may be supported, "and from the usual inaccuracy of "Vernon's Reports, he should suspect "that the plaintiff got the commission "by succession, and set up this de- "fence against the payment of the "bond; that there was something very "like it in the reasoning of the court, "who held there was no relief against "the bond. The question of considera- "tion did not occur to them, and "they seem to have held, that where "commissions were generally sale- "able there was nothing unfair in "such a transaction." The case of *Berrisford* v. *Done*, as stated in Reg. Lib. does not appear to differ materially from the printed report. By the bill, it appears, that the plaintiff was in fact merely an agent for one *Oldfield*, an ensign in the same company with *Done*, that the agreement made by him on behalf of *Oldfield* with *Done* was, that if upon the resignation of his office, *Oldfield* should be admitted and received as lieutenant of the said company of foot, upon such resignation, then the plaintiff should pay to *Done*, or as he should order 200*l.* and gave his bond to *Done*, in the penalty of 400*l.* accordingly. *Done* having in part made resignation under his hand by which he offered to resign his commission as lieutenant in the said company, and release his interest in the same to the Duke of *Ormond*, and therein recommended *Oldfield* to be made lieutenant in his place, but the Duke did not accept the resignation, and *Oldfield* had no benefit or advantage of the said agreement so made with *Done*, on his behalf by the plaintiff. The answer stated that the agreement was only to resign, and no further. The parties went into evidence and the decree was as stated in the printed report, except as to the costs at law, which were to be paid by the plaintiff, and no reasoning whatever from the Bench stated therein, Reg. Lib. 1682. A. fol. 91. As to the sale of military offices it is held that the stat. of Edw. 6th, does not extend to them, and that the stat. 7 William and Mary,* extends only to horse, foot, and dragoons, and not to marines, et vide *Symonds* v. *Gibson*, post 2 vol. 308. *Ive* v. *Ash*, Pre. Ch. 199. *Law* v. *Law*, Forr. 140. 3 P. Wms. 391, and cases cited there. [*Osborne* v. *Williams*, 18 Ves. 379. *Richardson* v. *Mellish*, 2 Bing. 229. *Money* v. *Macleod*, 2 S. & S. 301; and cases there respectively cited.]

* *Note.* This statute does not appear.

TURNER *versus* GWYNN.

Case 86.

21 *Novembris.*

In Court.

Lord Chancellor.

Eq. Ca. Ab. 139. pl. 6. S. C.

One seised in tail, and a term in trustees to attend the inheritance, levies a fine, and by deed subjects the land to a debt of 1,000*l.* but declares that, after the debt paid, the land to be to the old uses, and after devises the land for payment of all his debts. Decreed the land liable to all the debts in general. *Sed Q.*

THE case was to this effect. A man having a long term for years settled to attend the inheritance, which was entailed, he, by a fine and deed to lead the uses thereof, subjected this term for the payment of 1,000*l.* but declared, that after that sum was paid the land should be to the same uses as before. (1)

The bill was to subject this term to the payment of other debts.

For the defendant it was insisted, that a term, which is limited to attend the inheritance, is not assets, either in law or equity; (2) and when it is subjected for a particular purpose only, it shall not be strained nor extended further. [100]

But for the plaintiff it was answered, that though a term limited to attend the inheritance was not in itself in any sort assets either in law or equity; yet a man, that has such a term in him, may subject it to the payment of debts, if he pleases; and *Gwynn* in this case has actually done it, he having by his will devised all his lands in the

(1) The case as stated in Reg. Lib. is as follows, *Howell Gwynn*, by indenture of settlement, 10th Sept. 12 Car. 1. made on his marriage with *Elizabeth Jones*, became tenant for life of the premises in question, remainder to *Rowland Gwynn*, his son in tail-male, and that *Howell* and his wife being such tenant for life, and *Howell* having borrowed of one *Tuke* 1,000*l.* for securing the same, did in the year 1654 levy a fine, and suffer a recovery thereof to the use of *Tuke*, for securing the 1,000*l.* and after payment thereof to the same use as in the said deed of settlement. *Rowland Gwynn* on the death of the said *Howell* his father then becoming intitled to the premises as tenant in tail, became indebted to plaintiff's testator or intestate by bond, and afterwards made his will in 1674, and devised his real and personal estate in *Caermarthenshire* to his wife for a term of thirteen years, for payment of his debts and legacies, and if his debts and legacies should not be paid in thirteen years, then he charged the same lands, and also his lands in *Brecknockshire*, (being the lands so settled as aforesaid) to discharge the same. And the decree was, "that the fee simple lands subjected by the will of *Rowland* "*Gwynn*, to the payment of his debts, "together with his personal estate "should be applied in the payment "thereof, and in case they should be "found not sufficient then that the "other fee simple lands be forthwith "sold for that purpose," Reg. Lib. 1681. B. fol. 465.

(2) Vide *Tiffin* v. *Tiffin*, ante p. 1. *Chapman* v. *Bond*, post p. 188.

TURNER v. GWYNN.

county of *B.* where these lands lie, for the payment of his debts.

To this it was answered, that those words in the will might be otherwise satisfied, for that he had fee simple lands in that county, and the devise should be intended of them only; but that not appearing in the cause, it was decreed for the plaintiff, and the land subjected to the payment of the testator's debts in general. *Sed tamen quære.* For it seems, he was but tenant in tail of the inheritance, and so could not charge it by his will, unless it be intended he had still a power of doing it lodged in him by reason of the fine, notwithstanding he had declared, that after payment of the 1,000*l.* it should go to the former uses. (1)

(1) There appears to have been a re-hearing as to a particular demand of the plaintiff on the premises in question, and which was decreed to be paid thereout if necessary, Reg. Lib. 1682. B. fol. 219.

Case 87.

VILLERS *versus* BEAUMONT and *Al'*.

22 *Novembris. In Court. Lord Chancellor.*

Eq. Ca. Ab. 23. pl. 2. S. C.

Voluntary settlement without power of revocation shall bind the party, and shall not be defeated by a subsequent will. (1)

THE case upon the pleadings appeared to be thus, *viz.* The Lady *Ann Beaumont* took a lease from an hospital in *Leicester* for three lives in trustees names, in trust for her and her heirs. She dies, and this lease comes to one *William Beaumont*, who a little before his death, by a little scrap of paper, at an ale-house, but under hand and seal, settles this term (in which he had then only a trust) upon the plaintiffs, * his cousins, to the intent to pay his debts, and gave the surplus to them. (2)

[*101] After this, he being dissatisfied with this settlement, which he had delivered out of his hands to a creditor, makes his will in writing, and thereby devises this term, subject also to the payment of his debts, to his half brother the

(1) So though charged by the will with payment of debts, *Bale* v. *Newton*, post p. 464.

(2) This is stated to have been a deed signed, sealed, and executed by *William Beaumont*, and purporting to bear date five months before the date of his will, whereby he granted and assigned the estate in question to the plaintiff *Villers*, for payment of his and his mother's debts, but to permit him to hold the same for his life, R. L.

defendant the Lord *Beaumont*, in whose family this lease had for a long time been: and the question was, whether the deed or will should prevail.

On behalf of the defendant it was insisted, that the manner of obtaining this deed carried with it badges of fraud and circumvention, or of a surprise at least; Mr. *Beaumont* declaring as much, presently after the executing of it: and it was further insisted, that a man had a power over such a voluntary settlement, for which was cited the Lord *Ormond's* case, as an authority in point.

But it was answered, that all latter resolutions had been contrary to the opinion in that case, and instanced particularly in the case of *Crump* and *Bowater* and the latter case of *Curtis* and *Hatcher*, concerning Mrs. *Leviston's* estate; where it was resolved, that a second deed should not prevail against the former; much less a will. (1)

Lord Chancellor. There is no colour in this case: If a man will improvidently bind himself up by a voluntay deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put upon himself, but he must lie down under his own folly: for if you would relieve in such a case, you must consequently establish this proposition, viz. *That a man can make no voluntary disposition of his estate, but by his will only, which would be absurd.* (2)

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(1) Vide *Allen* v. *Arme*, post 365. *Bale* v. *Newton*, post 464. *Clavering* v. *Clavering*, Hil. 1704. Pre. Chan. 235, and post vol. 2. p. 473. *Chadwick* v. *Dolman*, ibid. 530. Case of Duchess of *Albemarle* v. Earl of *Bath*, 3 Ch. Ca. p. 55. *Young* v. *Cottle*, 1 P. Wms. 100. *Boughton* v. *Boughton*, 1 Atk. 625. [*Pulvertoft* v. *Pulvertoft*, 18 Ves. 84. *Worrall* v. *Jacob*, 3 Mer. 270. *Sear* v. *Ashwell*, 3 Swan. 411. *Bolton* v. *Bolton*, ib. 414. *Cecil* v. *Butcher*, 2 J. & W. 565. *Doe* v. *Knight*, 5 B. & C. 671.] But where of two voluntary settlements the first is gained by fraud, the second shall prevail, *Naldred* v. *Gilham*, 1 P. Wms. 580. Et vide *Cotton* v. *King*, 2 P. Wms. 358. But in no case where a deed is not sufficient to pass the estate, and the party must come into equity, has this court executed a mere voluntary agreement; there must, in such case, be a valuable, or at least a meritorious consideration, *Colman* v. *Sarrell*, 1 Ves. jun. 54. Et vide distinction between voluntary agreement and actual conveyance creating a trust for mere volunteer, where neither good, valuable, or meritorious consideration, *Ellison* v. *Ellison*, 6 Ves. 662. [*Antrobus* v. *Smith*, 12 Ves. 39.]

(2) The defendant, Lord *Beaumont*, filed a cross bill for the establishment of the will, and that the trustees might thereunder assign the term to him, which was dismissed, but without costs. It appears that during the pendency of this suit, two of the lives dropped, and it being alleged that the remaining life might drop before the cause could be brought to a hearing, an order was obtained that the plaintiffs should have leave to renew the lease,

and to add two lives to the life then in being, Reg. Lib. 1682. B. fol. 123. *Note.*—The trustees having the legal estate were directed to convey and assign upon payment to one of them of a debt due to him from Lady *Beaumont*, R. L.

Case 88.

20 *Novembris.*

In Court.

Lord Chancellor.

CHILD *versus* STEPHENS.

Eq.Ca.Ab. 142. pl. 4. S. C.

A man indebted by several mortgages, judgments, bonds, and simple contract, settles his estate for payment of his debts. The real securities shall be first paid, and then the bonds and simple contract debts in average.

THIS case came before the *Lord Chancellor*, upon a point reported specially by the *Master* for his lordship's judgment, and was in short no more than this. *Upon Mr. *Child's* estate there were many mortgages, judgments, and statutes, and he likewise owed several debts upon bond and simple contract, and had both by deed in his life-time and by will conveyed and settled all his lands upon trustees for payment of his debts: now some parts of his estate he had mortgaged no less than thrice over; each time for near the full value.

[*102] It was now insisted, that these subsequent mortgages were not incumbrances on the land; for all the estate in law was in the first mortgagee, and so the subsequent mortgagees had only an equity; and likewise the judgments, they would not immediately affect the land then in mortgage: and it comes within the common case, where a man settles by deed, or devises by will, lands for payment of his debts; there all creditors shall be paid alike in proportion; whether they are creditors by bonds or on simple contract, unless their security do affect the very lands so settled or devised for payment of debts; and therefore the subsequent judgments and mortgages ought only to be paid in proportion with the bond creditors and debts upon simple contract, which the *Lord Chancellor* at first conceived ought to be so done; and asked what could be said against it.

Whereupon it was insisted, that the mortgagees had a security for their money, which a court of equity would never take from them, and being so, there could be no sale made of this estate without their consent; and so all the debts would remain unsatisfied: for they that had the subsequent securities, had still, in preservation of their own interest, a right to redeem: and to set this estate in a course of redemption, would make pretty work in this case, where there were more than thirty mortgages. For example, *A.* is

a subsequent mortgagee; *B.* has a prior mortgage of a moiety of the lands contained in *A.*'s mortgage, and also of several other lands. *C.* has a prior mortgage of the other moiety of the lands comprised in *A.*'s mortgage, and also of several other lands: now has *A.* a plain right to redeem all the lands contained in both the mortgages of *B.* and *C.*; and so it may be carried on through the alphabet.

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And after long debate, the *Lord Chancellor* ordered, that the real securities should be first satisfied, and then the debts by bond and simple contract to be paid in average; for that any other method in this case would become impracticable.

Afterwards at another day, *viz.* 5th of *December*, being the first seal, a motion was made in this case on behalf of one *Penruddocke*, (who had a judgment on this estate) that he might be let into a satisfaction of his judgment, before the second mortgagees, he being at law intitled to that preference, and therefore ought not to be deprived of it in equity.

The *Lord Chancellor* declared, he thought the motion reasonable; till upon repeating the reasons above mentioned he was satisfied, it was not to be done in this case: if legal preference should be precisely observed, it would end in confusion; and so made no order upon the motion; all the other creditors having consented to the former order; but left *Penruddocke* to get his satisfaction, as he could by law. (1)

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(1) Reg. Lib. 1682. A. fol. 102. Vide *Girling* v. *Lee*, and cases there cited, ante 63. *Deg* v. *Deg*, 2 P. Wms. 412. on appeal, and cases there cited; and formerly it was considered that if the devise was to executors and also to a third person, a stranger, the assets would be equitable only, Lord *Masham* v. *Harding*, Bun. 239. Vide *Sharpe* v. Earl of *Scarborough*, 4 Ves. 538. And note in this case the *Master* in his Report stated a doubt how far the trustees should be allowed their charges for executing the trust mentioned in the report, inasmuch as the estate was not sufficient to pay the debts, but the court ordered the same, and all such charges as they should so incur afterwards, to be paid out of the moneys in their hands, to be raised by a sale or profits of the estates, R. L.

Case 89. **TILLOTSON *versus* GANSON. (1)**

23 *Novembris.* *In Court.* *Lord Chancellor.*

UPON a motion, an order for a man to make his election, whether he would proceed here, or at law, was discharged, as being irregular; for that it was obtained before the defendant had answered. (2)

Plaintiff is not bound to make his election, till defendant has answered.

(1) There is merely an order to discharge the order of election in the register's minute-book.

(2) So if defendant plead statute of limitations, plaintiff not bound to elect till plea argued, *Vaughan* v. *Welsh*, Mose. 210. So as to plea in bar, *Anon.* ibid. 304. *Jones* v. *Strafford*, 3 P. Wms. 90. [*Fisher* v. *Mee*, 3 Mer. 45.] When plaintiff suffers his bill in this court to be dismissed on election to proceed at law, and then miscarries there, he may resort hither again, in regard a dismission upon an election is no more peremptory than a non-suit at law, Lady *Plymouth* v. *Bladon*, post vol. 2. p. 32.

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Case 90. **ANONIMOUS.**

13 *Novembris.* *In Court.* *Lord Chancellor.*

WHERE a man devises lands for payment of debts and legacies out of the rents and profits of the same; there the trustees, it being in the case of a will, may sell the lands: (1) but if it be to pay debts and legacies out of the annual

Eq. Ca. Ab. 199. pl. 7.

Where land is devised to pay debts and legacies out of rents and profits, the land may be sold. Otherwise, if out of annual rents and profits. But if such trust is by deed, the land cannot be sold in either case.

(1) The natural meaning of raising by rents and profits is by the yearly profits, but to prevent an inconvenience the word profits has, in some particular instances, been extended to any profits the land will yield, either by sale or mortgage, *Backhouse* v. *Middleton*, 1 Ch. Ca. 176. *Lengin* v. *Foley*, 2 Ch. Ca. 205. *Warburton* v. *Warburton*, post 2 vol. 420. *Trafford* v. *Ashton*, 1 P. Wms. 418. *Ivy* v. *Gilbert*, Pre. Ch. 586. 2 P. Wms. 19. 2 Brown. Par. Ca. 468. *Green* v. *Belchier*, 1 Atk. 506. *Okeden* v. *Okeden*, 1 Atk. 550. *Hall* v. *Carter*, 2 Atk. 358. where the cases, on raising portions in the lifetime of parents and to the prejudice of remainder-man are stated and considered, et vide Powell's Law of Mortgages, 90, et seq. But in no case where there are subsequent restraining words, has the meaning of the word profits been so extended, *Ivy* v. *Gilbert*, ub. sup. and cases cited in not. there. *Green* v. *Belchier*, 1 Atk. 506. *Ridout* v. Earl of *Plymouth*, 2 Atk. 105. A devise of the profits is however considered at law and in equity as a devise of the land itself, *Green* v. *Belchier*, ub. sup. *Johnson* v. *Arnold*, 1 Vez. 171. Et vide on that head *Baines* v. *Dixon*, ibid. 42. *Hall* v. *Carter*, 2 Atk. 358. *Lingard* v. Earl of *Derby*, 1 Bro. Ch. Rep. 310. And

rents and profits; there, though it is in case of a will, the lands shall not be sold: but such words in a deed executed in a man's lifetime shall, in neither case, empower the trustees to sell. ANONIMOUS.

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from the above cases in general it appears the court leans to the liberal interpretation of the words rents and profits. [So *Allan* v. *Backhouse*, 2 V. & B. 65. *Bootle* v. *Blundell*, 19 Ves. 528. 1 Mer. 232.] As where a devise to pay debts at a certain time by rents and profits, and rents and profits not sufficient to pay within the time prescribed, the court will decree a sale or mortgage, sic dict. per *Eldon*, Lord Chancellor, *Richards* v. Earl of *Macclesfield*, 10 Ves. [No such case reported in Ves. jun.—*Editor.*] And that a devise to pay debts by rents and profits, would take it out of the statute of fraudulent devises, was considered as settled by Lord *Hardwicke* and others, not to be shaken, *Ridout* v. Earl of *Plymouth*, 2 Atk. 105. *Lingard* v. Earl of *Derby*, 1 Bro. Ch. Rep. 312. till the dictum by Lord *Thurlow*, in *Hughes* v. *Dolben*, 2 Bro. Ch. Rep. 611. ibid. But whether such a devise will do if ineffectual, still remains a question, as the judgment in the above case of *Richards* v. Earl of *Macclesfield*, is not yet delivered. But such a devise of the lands must be *bonâ fide*, and in a manner that will answer the purpose, *Hughes* v. *Dolben*, 2 Bro. Ch. Rep. 614. [S. C. 2 Cox, 170.] As to the length of time in which rents and profits were formerly allowed to accumulate for payment of debts, vide the case of Sir *Nicholas Carey's* will, cited by *Lord Chancellor* in *Richards* v. Earl of *Macclesfield*, ub. sup. but now restrained to the life of the settlor, or 21 years from his death, or during the minority of persons intitled as therein mentioned, vide stat. 39 and 40 Geo. III. cap. 98. Et vide *Griffiths* v. *Vere*, 9 Ves. 127. where trust by will for accumulation during a life, contrary to the statute, held good for 21 years. [But the statute does not extend to provisions for payment of debts. See sect. 2.]

ANONIMOUS. Case 91.

If the defendant is in contempt for not answering, and on motion he obtains time to answer; if it be not expressly ordered, that all contempts in the mean time shall be staid, the plaintiff may go on and prosecute the defendant for not answering.

Case 92. **DOWSE *versus* PERCIVAL.**

27 Novembris. In Court. Lord Chancellor.

Eq. Ca. Ab. 151. pl. 3. 2 Ch. Ca. 160. S. C.

A CITIZEN and freeman of *London* possessed of a lease worth 1,500*l.* bought the reversion and inheritance thereof in the name of trustees for 150*l.* and died. And whether this lease being assets in law shall be part of his personal estate, subject to the custom of *London* (there being no declaration that it should attend the inheritance) was the question.

A freeman of *London*, having a term in his own name, purchases the inheritance in the name of a trustee, and there is no declaration of trust, that the term shall attend the inheritance.

This term shall attend the inheritance, and not be subject to the custom. *Vid. ante Tiffin* and *Tiffin, Case* 1.

And it was decreed, that though this lease would be assets in law to pay debts; yet it should attend the inheritance, though there was no declaration of trust that it should do so, and not be liable to the custom.

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2 Ch. Rep. *Rich* v. *Rich*, fol. 160.

This cause was reheard before the Lord Keeper *North* in Feb. 1683, and he confirmed the decree. (1)

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(1) The point of there being no declaration of trust is not mentioned in the statement of this case in the Register's Book. The decree as to the term declared, "That the lease, although taken in the intestate's own name, *he then having otherwise sufficient for the debts*, cannot be subject to the custom of *London*, the lease and conveyance of the inheritance being one conveyance." Reg. Lib. 1682. A. fol. 186.

Case 93. **ANONIMOUS. (1)**

Special election to proceed at law in an ejectment for the land, and in equity for an account of profits.

WHERE a man is put to his election, whether to proceed at law or in this court, if the bill be for the land and to have an account of the mesne profits, he may elect to proceed in an ejectment at law for the possession, and in equity upon the account; because at law he can recover damages

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(1) There is an entry of a motion on the part of defendant in a case of *Braithwaite* v. *Geary*, in the Register's minute-book of this term, praying that process out of the petty bag may be stayed in respect of a statute, plaintiff having elected to proceed here, but the court would make no order to stay proceedings.

for mesne profits, from the time only of the entry laid in the declaration. (2) ANONIMOUS.

(2) For observations on bills in this court for mesne profits, vide argument of *Attorney-General* in the case of *Dormer* v. *Fortescue*, 2 Atk. 282. *Scholefield* v. *Scholefield*, 13th and 14th Dec. 1781. And for quære on the doctrine here laid down, vide *Dormer* v. *Fortescue*, 3 Atk. 130. Where said by *Lord Chancellor*, "I "can by no means admit the latitude "in the *Anon.* case, 1 Vern. 105." And note a dismission upon an election to proceed at law is not peremptory, vide case cited in note to *Tillotson* v. *Ganson*, ante p. 103.

SACKVILL *versus* AYLEWORTH.

Case 94.

15 *Decembris.*

At the Lord Chancellor's house.

Coram Justice Charleton.

Eq. Ca. Ab. 234. pl. 3.

A bill will not lie to perpetuate the testimony of witnesses to a lunatic's will, in his lifetime, made before his lunacy.

ONE *Aylesworth* having formerly made a will, and thereby devised great part of his estate to the plaintiff *Sackvill*, and *Aylesworth* the testator being since that time become a lunatic, the plaintiff exhibited his bill against the defendant (who was presumptive heir at law to the lunatic) to examine witnesses touching this will *in perpetuam rei memoriam:* and the defendant demurred, because it was a bill to prove a man's will in his lifetime; and for that the plaintiff had no right or title by the will until the testator's death: a will being until that time ambulatory, and in truth is no will till the testator's death. (1)

For the plaintiff it was insisted, that to examine witnesses *in perpetuam rei memoriam* is a chief part of the original jurisdiction of this court, it being in all cases a natural equity to have testimony preserved; and that in this case it would be no prejudice to any one; for if the lunatic should recover his understanding, the will, notwithstanding this examination, would be revocable: and it might be a manifest prejudice to the plaintiff to deny him the benefit of this examination; for this lunatic may still live many years, and continuing a lunatic he is incapable of making another will, or

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(1) Vide the demurrer at length in Prax. Alm. vol. 2. p. 500. Et vide *Smith* v. *Attorney General*, on demurrer 17th December, 1777, before Lord *Bathurst*, assisted by Sir *Thomas Sewell*, Lord C. J. *De Grey* and Lord Chief Baron *Skynner*, where bill brought by persons who were then, as they stated by their bill, the next of kin of one Mr. *Newport*, a lunatic, in case he died intestate, and without recovering from his state of lunacy, and demurrer allowed. [*Dursley* v. *Fitzhardinge*, 6 Ves. 260. *Allan* v. *Allan*, 15 Ves. 130.]

SACKVILL v. AYLEWORTH

of new publishing this; and in that time all the witnesses to the will, that could prove the testator to be then *compos mentis*, might be dead. And they compared it to the case formerly at common law, where a man became professed, there his will should be proved, and yet he was not absolutely dead in law; for he might be afterwards *deraigned*. (But *Q.* whether the will could be proved till after the year and day, after which time he could not be *deraigned*.) But Mr. Justice *Charleton* doubted, whether a lunatic could have any will, but that this lunacy was a revocation of all wills made by him, whilst *compos mentis*. (1) *(Mes sans doute lunacie n'est aucun revocation,)* and an exception was taken to the bill, that the lunatic ought to have been made a party, and to have had a committee assigned him, to have defended the suit (2); but it was answered, it is true, where a lunatic is sued, he must have a committee assigned him to defend the suit; but in this case there was nothing prayed against the lunatic, and so no need of that. But the bill was dismissed. (3)

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(1) Contra *Forse* v. *Hambling's* Case, 4 Co. Rep. 61, ib. 124 *b*. So agreement made by *A.* with B. *A.* afterwards becomes a lunatic, specific performance of agreement decreed, *Owen* v. *Davies*, 1 Vez. 82. Vide also 1 Ander. 181. pl. 217.

(2) Vide *Attorney-General* v. *Parkhurst*, 1 Ch. Ca. 113, where held on a bill by *Attorney-General*, lunatic need not be made a party, but leave given to traverse the inquisition. In what case contra, *Attorney-General* v. *Woolrich*, ib. 153, and an ideot need not be made a party, ib. It is held if an ideot sue or defend he must appear in person, for the suit must be in their name; but it shall be followed by others, and any one who prays to be admitted as his friend, or who can make a better defence may sue or defend for him, but a lunatic, or one who becomes *non compos mentis*, must appear by guardian, if he is within age, and by attorney if he be of full age, *Beverley's* Case, 4 Rep. 124 *b*. Vide 1 Inst. 135 *b*. Et vide *Coke* v. *Darston*, 1 Golds. 197, where held action of trespass should be brought in the name of the lunatic.

(3) The Order appears by Reg. Lib. to be, that the plaintiffs do amend their bill, and make such persons parties thereto as they shall be advised, but the plaintiff's guardian is to pay the defendant before such amendment the costs of allowing the demurrer, Reg. Lib. 1682. B. fol. 127. N. B. The case is reported under the name of *Saville* v. *Saville*.

WRIGHT *versus* BLUCK.

Case 95.

15 *Decembris. At the Lord Chancellor's House: Coram Justice Charleton.*

Eq. Ca. Ab. 77. pl. 12. S. P. 236. pl. 7. S. C.

Bill by an administrator for discovery of the personal estate. It is no bar to the discovery, that the administration is litigated.

A MAN by will devised several legacies, and made the defendant sole executor; who having the right of administration, to avoid the legacies, refuses to prove the will, and had indeed sworn that the pretended intestate had made no will, (for otherwise the Spiritual Court would not have granted administration,) and thereupon obtains administration, and exhibits a bill to have a discovery of the personal estate.

To this bill the defendant pleaded, that the supposed intestate had made a will, and produced it in court, and that the [107] plaintiff was privy to the making of it, and that there was now a suit depending in the Spiritual Court, to revoke the administration, and the plaintiff was cited to prove the will. (1)

But the plea was over-ruled, as containing no equity, why the defendant should not answer as to the discovery of the testator's estate. (2)

(1) It seems an administration, where there is a will in being is void, *Abram* v. *Cunningham*, 2 Lev. 182. *Pond* v. *Underwood*, Lord Raym. 1210. *Jacob* v. *Allen*, 1 Salk. 27, cited in *Attorney-General* v. *Perry*, Com. Rep. 488. [But see *Allen* v. *Dundas*, 3 Term Rep. 125.]

(2) And costs respited to the hearing, Reg. Lib. 1682. B. fol. 110. So *Dulwich College* v. *Johnson*, post 2 vol. 49. *Phipps* v. *Steward*, 1 Atk. 285, and cases cited in not.

PAGE *versus* NEALE.

Case 96.

Eodem die. Coram Justice Charleton.

Eq. Ca. Ab. 40. pl. 6. S. C.

Whether demurrer proper to scandalous matter suggested in a bill.

THE bill being to be relieved against a bond of the testator's, suggesting that it was entered into without any consideration, it being only for that the testator had unlawfully kept company with the defendant, and had a bastard by her:

To that part of the bill the defendant demurred, as being a matter scandalous, and that it ought not to be answered unto. (1)

(1) Vide *Clark* v. *Periam*, 2 Atk. 333-337. *Whaley* v. *Norton*, post 483, and cases cited in not. there.

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It was insisted for the plaintiff, that a demurrer was not the proper way to be relieved for scandal, but that it was proper to refer the bill for scandal, and to have it expunged: but it was answered, that the defendant might proceed either the one way or the other; and this being a way proper enough by the course of the court, if this demurrer should not be allowed, every woman might be brought to swear, whether such a man did not lye with her.

But on the other hand it was insisted, that if this demurrer should be allowed, then though the matter which they call scandalous were true; (and it was in truth the only consideration of the bond,) yet then they could not be received to prove it.

But Sir *Jo. Churchill*, who was not counsel in the cause, informed the Judge, that the course of the court in such a [108] case was, not to put the defendant to answer the scandalous matter, but to strike out the word *demurrer*, and leave the plaintiff at liberty to prove it: though it was doubted, if the plaintiff proved the suggestion of his bill in the principal case, it would not at all have availed him. (1)

(1) The Order appears by the Register's Book to be, that the word demurrer be struck out, and that the plaintiffs do proceed on the answer already put in, and not upon the matter that is demurred to without costs, Reg. Lib. 1682. B. fol. 127. Vide *Franco* v. *Bolton*, 3 Ves. 368. Which was a bill after verdict upon a bond against obligor, to have it delivered up, charging the consideration to have been an agreement by the defendant to cohabit with plaintiff, as his wife, and that she had lived in a state of adultery and incontinence with various persons, and praying a discovery; and demurrer to the whole bill allowed.

Case 97.

RIDDLE *versus* EMERSON.

Eodem die. Eq. Ca. Ab. 381. pl. 3. S. C.

A lease for years to *A.* but by parol agreed to be in trust for *A.* and *B.* jointly. *B.* pays a moiety of the rent. If this is within the statute of frauds, &c.

THE bill was, that the plaintiff and defendant agreeing together to take a lease of a colliery of Sir *Gilbert Gerrard*, they contracted with Sir *Gilbert* for it at a certain rent; but by agreement, the lease was taken in the plaintiff's name only, but the same was in trust, that the defendant should be joint-tenant with him, and have a moiety of the profits, and should pay a moiety of the rent: and Sir *Gilbert Gerrard*, both at the sealing of the lease, and before, had refused to let it to the defendant, but upon condition, that the plaintiff should be permitted to receive a moiety of the profits, and be answerable for a moiety of the rent: and Sir *Gilbert* had,

since the making of the lease, demanded and received a moiety of the rent of the plaintiff.

To this bill the defendant pleaded the Act of *Frauds* and *Perjuries*, and that this pretended trust was not declared in writing according to the Act.

For the plaintiff it was insisted, that this was a resulting trust, and such a trust as the law would create; and therefore there needs no declaration of it in writing; for the rent in this case reserved is the consideration of the lease, and a moiety of that being according to the said agreement paid by the plaintiff, *that* raises a trust to him for a moiety of the profits: And this is a plain resulting trust, for a lessee rendering rent is in nature of a purchaser, and shall have the same favour in equity, as was resolved in the case of *Woodroffe* and *Cooke*. (1)

Then it was insisted that this was only a lease for three years, on which more than two full thirds of the best improved rent was reserved, and was therefore excepted out of the statute. [109]

But it was answered, that there is no colour to make this a resulting trust: indeed where *I. S.* buys lands, and pays the purchase money; if the conveyances are made to *I. D.* this will be a resulting trust: (2) but in the present case, to make a man a joint lessee with one, that is sole lessee by the lease in writing, because the landlord has since accepted a moiety of the rent of the other, is ridiculous; neither from this matter, *ex post facto*, can a resulting trust be raised by construction for the plaintiff; and that by an act, *viz.* the payment of the rent, to which the defendant was neither consenting nor privy.

And as to the other matter, that this is a lease for three years only, on which two full thirds of the improved rent is reserved, and so out of the Act; the answer is plain; such

(1) And court inclined to think should avoid a voluntary conveyance. *Shaw* and *Al.* v. *Standish*, post 2 vol. 326.

(2) Vide *Gascoigne* v. *Thwing*, post 366, and cases cited in note there. But where a purchase by the father in the name of his eldest son, an infant, this was advancement for the son, and not a resulting trust for the father, *Mumma* v. *Mumma*, post 2 vol. 19, and cases cited in note there. And where mortgage in fee made for 700*l.* but half the money was *B.'s*, but yet for want of a declaration in writing, *B.* was not admitted to read the proof of it, so as to create a trust for him, being against the statute of frauds, *Newton* v. *Sir Isaac Preston*, Pre. Ch. 103. Et quære, whether trusts arising by implication, and as such excepted by the statute, must not be such trusts as arise upon the face of the deed itself?

RIDDLE v. EMERSON.

a lease may be made by parol, but when such a lease is made in writing, the trust of that lease cannot be declared by parol. But the Judge being doubtful, though inclined to over-rule the plea, the counsel consented, that the word plea should be struck out, and that it should stand for an answer.

Case 98.

BIRD *versus* HARDWICKE.

Eodem die.

Eq. Ca. Ab. 76. pl. 4. S. C.

A man is not bound to discover what may subject him to the penalty of an act of parliament.

[110]

THE bill charged, that the plaintiff having several great quantities of port wine on board several ships in the river, and the defendant having likewise some of the same wines, he on purpose to raise the price of the market, and to sell his own wines at a better rate, and unjustly to retard and obstruct the plaintiff in the sale of his, caused the plaintiff's wines to be seized as *French* wines, and detained till the defendant had sold all his own wines; and that then the defendant relinquished his prosecution, well knowing that the plaintiff's wines were *Port* wines, and not *French* wines: and therefore it was prayed that the defendant might answer the premises, in order to the plaintiff's bringing an action on the case for damages.

The defendant pleaded the Act for prohibiting of *French* wines, and a penal clause therein on any man that should seize or cause to be seized any wines, as *French* wines, and afterwards compound the matter, or relinquish his prosecution; and insisted that this bill being to subject him to a forefeiture, he was not bound to answer it.

The plea was allowed. (1)

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(1) But without costs, Reg. Lib. 1682. A. fol. 92. The cases are numerous that establish the rule that no one is bound to answer so as to subject himself either necessarily or eventually to forfeiture or punishment, or any thing in the nature of a forfeiture. And so it is in respect to maintenance and sale of contested rights or titles, on demurrer and plea of stat. 32 Hen. 8. cap. 9. *Sharpe* v. *Carter* and *Others*, 3 P. Wms. 375. So as to usury on demurrer, the Earl of *Suffolk* v. *Green*, 1 Atk. 459. So before the 18th Geo. 3d. cap. 60, as to any disability created by being a papist. *Smith* v. *Read*, 1 Atk. 526. *Harrison* v. *Southcote*, ibid. 528. 2 Vez. 389, S. C. And consequently as to any disabilities still remaining in regard to papists, and a disability held generally equivalent to a penalty or a forfeiture, *Molings* v. *Molings*, 2 Ch. Ca. 8. *South Sea Company* v. *Dolliff*, cited in *Smith* v. *Read*, up. sup. But *Molings* v. *Molings* not to be found as there cited. So in the case of a forfeiture of any interest; as where forfeiture on marriage without consent, *Wrottesley* v. *Bendish*, 3 P. Wms. 235. *Chauncey* v. *Tahourden*, 2 Atk. 392. *Chancey* v. *Fenhoulet*, 2 Vez. 265. So where charge of sub-

ornation of perjury, *Baker* v. *Pritchard*, 2 Atk. 387. Or where defendant intitled during widowhood, or on lease assigned without licence, Lord *Uxbridge* v. *Haveland*, 1 Vez. 56. So as to unlawful presentation to living, *Boteler* v. *Allington*, 3 Atk. 453. So as to defendant's being an alien, case of Mrs. *Duplessis*, cited *Finch* v. *Finch*, 2 Vez. 494. and reported Sir Thomas Parker, 144, and 5 Brown. Par. Ca. 191. So where bill sought discovery how goods came into possession of defendant, which possession would subject him to fine or corporal punishment, or penalties under an Act of Parliament, *Duncalf* v. *Blake*, 1 Atk. 53. *East India Company* v. *Campbell*, 1 Vez. 246. So where bill filed to discover if defendant had given a general bond of resignation, *Attorney-General* v. *Sudell*, Pre. Ch. 214. And the principle appears to be recognised in a similar case, though demurrer overruled, Bishop of *London* v. *Fytche*, 1 Bro. Ch. Rep. 96. Sed vide note *m.* Mitf. Tr. 156. So where the discovery would subject the defendant to punishment for incest, in the ecclesiastical court, *Brownsword* v. *Edwards*, 2 Vez. 243. *Finch* v. *Finch*, ibid. 493. So as to a conspiracy that would be a ground for criminal prosecution, *Chetwynd* v. *Lindon*, 2 Vez. 450. So where a collateral charge, if connected with the principal one, *Baker* v. *Pritchard*, 2 Atk. 387. So where the bill calls for the discovery of any act of moral turpitude, Mrs. *Duplessis's* case, Parker Rep. 163. *Franco* v. *Bolton*, 3 Ves. 368. So a married woman may demur to a discovery that would subject her husband to a charge of felony, *Cartwright* v. *Green*, 8 Ves. 405. Et vide *Wynn* v. *Doughty*, 2 Eq. Ca. Ab. 77. p. 4. *Attorney-General* v. *Cromer*, Parker Rep. 279. *Attorney-General* v. *Vincent*, Bun. 192. *East India Company* v. *Neave*, 5 Ves. 173. But where the plaintiff is alone intitled to the penalties and expressly waives them, a discovery must be made, *Anon.* ante 60. [Mitf. Tr. 232.] How far such a waiver will prevent a demurrer where a moiety of the forfeiture belongs to the crown, vide *East India Company* v. *Sandys*, post 129. So though the discovery may subject *another* to a forfeiture of interest, or to disabilities, the case of Mrs. *Duplessis*, ub. sup. So where the discovery may occasion loss of a future or present benefit, as in the case of conditional limitation over, vide case before Lord *Talbot*, cited arg. in *Chauncey* v. *Tahourden*, 2 Atk. 393. *Lucas* v. *Evans*, 3 Atk. 260. This case however, seems to have been decided very much on the circumstances. *Chauncey* v. *Tahourden*, was cited for the demurrer, and it appears difficult to distinguish the principle of the two cases, though Lord *Hardwicke* there expressly does distinguish between forfeiture and conditional limitation over. The same difficulty occurs in *Chancey* v. *Fenhoulet*, 2 Vez. 265, which appears to be very indifferently reported. Lord *Hardwicke*, Chan. is there made to say when the continuance of an estate is *only during widowhood*, it is no more than a conditional limitation, and so in strictness, perhaps, it must be considered. It is, however, obvious to remark that the estate during widowhood, as curtailed by a second marriage, is not only no continuing estate, but can never have any existence, except by the very act alone, that at the same moment puts an end to it, the forfeiture or loss must necessarily be of some other and better estate, which must have *continued* if the widow had not married again. And where the loss or damage that may be occasioned by the discovery, is merely contingent, as in the common case of bills of discovery, for the purpose of an action, there the defendant must answer, *Heathcote* v. *Fleete*, post 2 vol. 442. *Morse* v. *Buckworth*, ibid. 443. But it is apprehended these cases do not strictly come within the idea of penalty, forfeiture, or punishment, vide *Grey* v. *Hesketh*, Amb. 268. So where though the discovery may be the means of ascertaining the existence of a crime which may affect the defendant, by means *aliunde*, but not to fix it in the defendants, he must answer, vide *Brownsword* v. *Edwards*, 2 Vez. 246. So where the discovery

sought is not of a fact, which can subject the defendant to any penalty, but connected with some other fact which may, *Finch* v. *Finch*, 2 Vez. 493. And a distinction is taken where the discovery will subject defendant to a payment in nature of a penalty, in consequence of his own agreement, and there defendant compelled to answer, *Richards* or *Brodrepp* v. *Cole*, in Chan. Hil. Vacation, 1779, cited in Mit. Tr. p. 159. So where the only variation is, that the covenant or agreement is not special or particular, but in a common and usual form, *African Company* v. *Parish*, post 2 vol. 244. There appears at first sight to be also some difficulty in reconciling the case of *Leigh* v. Lord *Warrington*, 2 Vez. 272, 5. 4 Bro. Par. Ca. 91, and Mrs. *Duplessis's* case, as reported Sir T. Parker, 144, with the general principle and the cases that go upon it, except so far as incapacity to enjoy rights is to be distinguished from disability, and which appears to be the ground of the decisions. These were cases of information against alien to discover his place of birth in order to ascertain the fact of alienage; and demurrer in both cases over-ruled, though forfeiture in the common apprehension of the word appeared to be the evident consequence of an answer. And Mrs. *Duplessis's* case, as cited in *Finch* v. *Finch*, ub. sup. is different from the report in Parker, and directly against those cases; but as reported in Parker, however, was much argued and affirmed in the House of Lords. It may be proper to remark here with respect to the case of *Duncalf* v. *Blake*, 1 Atk. 53, above cited, that in Mitf. Tr. p. 230, the learned author of that book states the case shortly as follows, "And to a bill "brought by insurers for a discovery "of what goods had been shipped on "board a vessel, the defendant pleaded "the statutes which made it penal to "export wool, *he was, however, directed to answer so far as to discover "what goods were on board the vessel "besides wool*, 1 Atk. 53." By the printed report, it appears, that the bill was brought by insurers, suggesting that the ship (which had been lost) had been lost fraudulently, and with a view to charge the plaintiff with th policy, and charged that the ship being bound from a port in *Ireland*, to a port in *France*, had *only wool* on board, and by the interrogatory part of the bill, it was prayed that the defendant might set out what kind of goods he had on board, what the invoices were, in what manner the ship was cleared, and whether she had not arms on board her. To this bill, or so much thereof as the plea sought to cover, the defendant pleaded two Acts of Parliament, enacting forfeitures for wool, exported from *Ireland*. The *Lord Chancellor* allowed the plea, but agreed if other kinds of goods had been mentioned in the charging part, the defendant might have been obliged *perhaps* to have given some answer to it, but as there was not, defendant was not obliged to answer that interrogatory part.* And in page 161 of that treatise, and on the same subject it is said, "And where a "devise over of an estate in case of mar- "riage, was considered as a conditional "limitation, and not as a forfeiture, a "demurrer to a bill for a discovery of "marriage was *over-ruled*," and refers to *Chauncey* v. *Tahourden*, 2 Atk. 392. *Lucas* v. *Evans*, 3 Atk. 260. *Chancey* v. *Fenhoulet*, 2 Vez. 265. In all these cases the distinction between a limitation over, and a condition working a forfeiture is certainly taken, but it is in *Lucas* v. *Evans* only that the demurrer was over-ruled. In *Chauncey* v. *Tahourden*, it was expressly allowed, and in *Chancey* v. *Fenhoulet*, it is evident the demurrer must have been allowed, though it is not stated in words. †

* The plea is stated at length in the Register's book, and to have been allowed, and nothing more. Reg. Lib. 1737. A. fol. 211.

† The editor has not been able to find any entry of the latter case in the Register's book.

HAMM *versus* STEVENS.

Case 99.

Eodem die.

Eq. Ca. Ab. 37, pl. 3. 72, pl. 4. S. C.

A trustee for three persons is called to an account. All the *cestui que* trusts must be parties.

THE bill being to have an account of a trust, the defendant pleaded he was intrusted for three children, *viz.* for the plaintiff and his two brothers; and that the other two not being made parties to the suit, he was not bound to answer; for otherwise he might be thrice called to an account for the same matter.

The plea was allowed. (1)

(1) By Reg. Lib. 1682. A. fol. 55. it appears that the plea came on to be argued, and no counsel attending for defendant, the plea was over-ruled, and defendant ordered to answer; afterwards, fol. 58. same book, the former order was stayed, and the plea set down to be argued. On the 15th of December following it came on, but no counsel appeared for the plaintiff, whereupon in presence of the defendant's counsel the said plea being in abatement for want of parties, the same was allowed, Reg. Lib. 1682. A. fol. 93. Vide *Anon.* post 261, and cases cited in not. there.

MOORE *versus* HART.

Case 100.

Eodem die.

Coram Justice Charleton.

Vid. 2 Vent. 361.

Father on a treaty of marriage of his daughter does by a letter written to a third person agree to give 1,500*l.* portion with his daughter in marriage, this is binding, and out of the statute of frauds. *Vid. post Case* 197.

[* 111]

THE bill being, that the defendant intimating to the plaintiff's friends that he intended to give 4,000*l.* portion with his daughter, and having made it appear, that he was able so to do, the plaintiff with his approbation became a suitor to his daughter: but after, when the defendant understood that the plaintiff had a * real affection for his daughter, and that they had mutually engaged to marry each other, then the defendant began to recede from his promise, and pretended he could not part with so much of his estate at present, but would give his daughter in possession the moiety of a farm called *Creaton*, at *Wapenham*, in the county of *Northampton*, (the whole being, as he pretended, worth 4,000*l.*) and the other moiety after his death; if the plaintiff would accept of such portion; and did declare so much by letter under his hand, with an intent to encourage the plaintiff to marry his daughter: but the plaintiff, finding him to vary in his proposals, acquainted his friends therewith, and desired them to come to a certainty with the defendant touching the portion he would give with his daughter, if the plaintiff should marry her: whereupon a letter was wrote to

MOORE v. HART.

the defendant by a friend on the plaintiff's behalf, desiring the defendant to be plain, and to ascertain what portion he would give the plaintiff with his daughter, if he should marry her: and the defendant, about *January* 1680, came to this final agreement touching the same, *viz.* that the defendant should give and he did then promise and agree to give down upon the marriage with his said daughter to the plaintiff 1,500*l.* and to leave him 500*l.* more at his death, in case there should be any issue of the intended marriage; and did also agree, that both the sums should be charged on his said estate at *Creaton:* which promises and agreements were put into writing, and signed and subscribed by the defendant: and he did in a letter, in answer to the said former letter express and declare as much under his hand.

That about *February*, 1680, in pursuance of the agreement, the marriage was solemnized; and the defendant often after, as well as before, declared he would perform his promise and agreement; and the plaintiff upon his marriage became justly intitled to the said portion, and might well
[112] expect the same, it being but half of what the defendant at first voluntarily undertook to give, and much inferior to the plaintiff's estate. That the defendant refuses to pay the 1,500*l.* and 500*l.* and pretends he never made any such promise or agreement *with the plaintiff*, and thinks by that nicety to avoid the performance thereof. Whereas though the agreement was not actually made with the plaintiff, yet it was made with a friend of the plaintiff's on his behalf. That the defendant pretends the marriage was had without his consent or privity, and that whatsoever he wrote in any such letter, the same ought not to conclude him, because it was not a full agreement on both sides; there being no provision for a jointure; whereas the defendant never demanded any, well knowing his daughter would be entitled to dower: and whereas he pretends the marriage was without his consent; *that* was by his own contrivance; for when he found the plaintiff's affection set on his daughter, he contrived to have her marry the plaintiff without his seeming privity, and gave her directions so to manage the matter, that he might thence raise a pretence to avoid payment of the portion; and was, and did acknowledge himself, well pleased with the marriage, and knew when it was solemnized. That the defendant at other times pretends, the plaintiff's estate deserves not so great a portion, although he has owned by letters and otherwise, that he esteemed the

proposals touching the marriage as a great honour to him, and declared his only fear was, he should not be able to give a portion equivalent with the fortune offered him: and at other times he pretends, he is not able to give 2,000*l.* portion, although in truth he is seized of lands of inheritance of 4 or 500*l.* *per annum*, and threatens that he will secretly convey away all his estate to prevent the plaintiff's receiving the fruit of the agreement: and therefore that the 1,500*l.* might be paid down, and the 500*l.* secured, was the bill.

To this the defendant pleaded, that by an act intitled "*An act for Prevention of Frauds and Perjuries*," made 29 *nunc Regis* at the parliament begun at *Westminster*, 18 *die Maii*, *Anno* 13 *Regis nunc*, and from thence continued by several prorogations to the 15th of *February*, 1677, it was, amongst other things, enacted, that from and after the 24th of *June*, 1677, no action should be brought, whereby to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands and hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be put into writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized, *prout* the act. And doth aver, that neither he nor any other by him authorized, did make, sign or seal any contract or agreement in writing to any such effect or purpose, as by the bill is suggested, or any note or memorandum thereof, or of any agreement to that effect: and that the plaintiff's marriage was without his knowledge, privity or consent, and without any agreement in writing made or concluded upon in reference thereunto. And therefore he pleads the said matter in bar of the plaintiff's bill, and demands judgment. [113]

For the plaintiff it was insisted, that this was no good plea; for he has not at all answered to the particular circumstances of the case charged in the bill, which will much influence the case in equity, which is strong here; the agreement in this case being already executed on one side; and here he does not deny, that he wrote such a letter as is mentioned in the bill; but takes upon himself to judge, that such a letter does not amount to a sufficient note or memorandum of an agreement in writing within the act: and what he has said touching the agreement is not by way of answer, but only averred in the plea; so that if this plea

MOORE v. HART.

should stand we cannot except, as we might to his answer, where it is not full, whether he made such agreement or not: and here he has pleaded an act of parliament; whereas there is in truth no such act; for he pleads, that at a parliament begun at *Westminster*, 18 *die Maii*, *Regis nunc*, and from thence continued by several prorogations to the 15th of *February*, 1677: whereas the act of *Frauds* and *Perjuries* was made at a parliament begun the 8th of *May*, and not on the 18th, and was continued by prorogation to *Feb.* 1676, and not to *February*, 1677: so that he has quite mispleaded the act; and that must be fatal upon him: (1) for *pleas* and *demurrers* are not to be more favoured in equity, than they are at law; it being here only to prevent answering: and besides, the statute of *Frauds* and *Perjuries* being a public act, he will have the benefit of it at the hearing: and though this is a public law, yet if he will take upon him to plead it specially, and mistakes, it is as fatal to him as the mispleading of a private act would be. And they cited the case of *Love* and *Wotton*, *Cro. Eliz.* 245. where the defendant had pleaded the statute of *Usury* to be made 6 *die Feb.* 13 *Eliz.* whereas it was made 2 *die Feb.* And in that case, though after a verdict, and though the plaintiff in his replication had admitted there was such an act, yet the court unanimously declared, that the statute against usury being a public law, they were bound to take notice, there was no such statute, as the defendant had pleaded; and so would not give any judgment.

Mispleading of a public act of parliament.

But *Justice Charleton* conceived, that pleading ought not to be so strictly observed in equity, as it was in law, (2) (*mes quære*) and disallowed the plea upon the merits; and said, he did not know, but a man might make an obligation in a letter, if he put his hand and seal to it. (3)

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(1) Vide *Clarke's* case, Dy. 203 *a.*

(2) Vide *Lord Keeper* & *Al.* v. *Wyld* & *Al.* post 139, and cases cited in not. there.

(3) Reg. Lib. 1632. B. fol. 99. It is now clearly settled that a letter (signed) containing the terms of the agreement, or referring to another paper that contains the terms is sufficient to take it out of the statute, vide *Wankford* v. *Fotherley*, post 2 vol. 322, on appeal. *Bird* v. *Blosse*, 2 Vent. 361. Viscountess *Montacute* v. *Maxwell*, Pre. Ch. 526. 1 P. Wms. 618. *Clerk* v. *Wright*, 1 Atk. 12. *Welford* v. *Beazeley*, 3 Atk. 503. 1 Vez. 6. *Allan* v. *Bower*, 3 Br. Ch. Rep. 149, which was the case of written directions signed by lessor, as to lessee being permitted to remain at the same rent. *Tawney* v. *Crowther*, ibid. 161, 318. So a trust may be raised by implication from letters, and a paper referred to by them, and in the hand-writing of the party, though not signed or dated, *Forster* v. *Hale*, 3 Ves. 696.

ON Monday, 18th December, 1682, *about four o'clock in the afternoon, died the Earl of* Nottingham, Lord High Chancellor of England, *having had the custody of the Seal for more than nine years, and being then sixty-one years of age.*

December 20th, *Sir* Francis North, Lord Chief Justice *of the* Common Pleas, *was made* Lord Keeper, *and had the* Great Seal *delivered to him at the Council Board on* Wednesday *night, and the next day kept a private Seal for Writs, at his house in* Chancery-lane.

On the 23*d day of* January, *being the first day of the Term, the* Lord Keeper *took his oath as* Lord Keeper, *which was administered to him by the* Master of the Rolls. *And then Mr.* Saunders *was brought to the Chancery Bar, to take his oath, as* Serjeant at Law, *had his writ read, and prayed his appearance might be recorded, and was then sworn, and afterwards presented the* Lord Keeper *with a ring for himself, and another for the* King, *inscribed,* principi sic placuit: *and afterwards the* Lord Keeper *went into the* King's Bench, *and made a Speech to Mr.* Saunders, *and called him up to the* Bench, *and swore him* Chief Justice; *and afterwards went into the* Common Pleas, *and made a Speech to the* Lord Chief Justice Pemberton, *who was removed from being* Chief Justice of the King's Bench, *to be* Chief Justice of the Common Pleas.

DE

TERM. S. HILLARII,

34 & 35 *Car*. *II*. 1682.

IN CURIA CANCELLARIÆ.

Case 101.

ANONIMOUS.

11 *January*. *In Court*. *Lord Keeper*. Eq. Ca. Ab. 126, pl. 8. S. C. Motion to dismiss a bill on payment of 20*s*. costs.

UPON a motion made to dismiss a bill (wherein plaintiff had proceeded to an answer only) with 20*s*. costs; *per Lord Keeper, that* was a rule made at least 50 years since; and he saw no reason, if a defendant had been put to greater charge, why he should not have his full costs: and that for the future it should be referred to a Master to tax the defendant his costs in such case. (1)

(1) Order that for the future the costs in such case should be taxed. The party, in his affidavit, must in such case specify the particulars, that the court may judge of the reasonableness of them, vide post 334. *Anon*. 2 P. Wms. 387. 2 Atk. 288.

Case. 102.

ANONIMOUS.

Eodem die. Motion for a messenger upon a *Cepi Corpus* returned by the sheriffs of *London*.

UPON a motion for a messenger upon a *cepi corpus*, the defendant living in *London*, *Lord Keeper* said, this had been looked upon as a motion of course; but in truth it was grounded upon a mistake; for to his Lordship's knowledge, the officers of the city have not their own amercements: (1) they have no Royal amercements. (2)

(1) The Sheriff cannot take a bail-bond upon an attachment for not paying costs, but in such case a messenger is to go to bring in the party, *Anon*. Pre. Ch. 331.

(2) Vide *Anon*. 2 P. Wms. 301.

WILLIAMS *versus* MELLISH.

Case 103.

15 *January.*
In Court.
Lord Keeper.

Eq. Ca. Ab. 82, pl. 10.

The plaintiff not allowed to bring a bill of review, unless he performed the decree, or would swear he was unable to do it, and would surrender himself to the *Fleet;* to lie there till the matter on the bill of review was determined. *Vid. post Case* 158.

UPON a motion made by Mr. *Williams* on behalf of the plaintiff his brother, that proceedings might be stayed on the decree, until the plaintiff was heard on a bill of review: Mr. *Williams* insisted, that a bill of review was like a writ of error at law, or an appeal in the ecclesiastical court: and a writ of error at law, till the statute for special bail, was in itself a supersedeas: and that as to the precedents in court, he had looked into them, and found there was no constant rule; for sometimes a bill of review had been allowed before the decree had been performed, and at other times not.

Lord Keeper. Even before the statute for special bail on a writ of error, the writ was not such a suspension of the judgment, but that a man might nevertheless have had an action of debt on it: but I do not think there is any sound argument to be drawn from such comparisons. In this case the decree shall be performed to a tittle before any bill of review be allowed; unless the plaintiff *Williams* will swear himself not able to perform the decree, and will surrender himself to the *Fleet;* to lie in prison till the matter be determined on the bill of review. (1)

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(1) Vide *Fitton* v. Earl of *Macclesfield*, post 264. The rule is that a bill of review shall not prevent the execution of the decree impeached, and if money is directed to be paid, it ought regularly to be paid before the bill of review is filed, though it may afterwards be ordered to be refunded, *Bishop of Durham* v. *Liddell*, Bart. 2 Br. Par. Ca. p. 24, in note, cited Mitford's Tr. 70. Sed vide *Savil* v. *Darcey*, 1 Chan. Ca. 42, where a decree for payment of money and good security allowed to be given, and the rule dispensed with, *Baston* v. *Biron*, before the House of Lords, cited there, Bacon's Tracts, 280. *Note.*—In this cause a motion was made on the part of the plaintiff, that the defendant might give security to abide the order of the court on determination thereof upon a bill of review, the defendant insisted that the bill of review was filed for vexation, and that he had demurred thereto, and that plaintiff had given defendant a notice of a similar motion to be made on the last day of the then preceding term, and filed an affidavit thereof. The court refused both the motions, and ordered the plaintiff to pay 3*l.* costs, for both motions, Reg. Lib. 1682. B. fol. 287. The principal point does not appear in the Register's book.

Case 104. ANONIMOUS.

Eodem die. A BILL against a Corporation to discover writings. The defendants answer under their Common Seal; and so being not sworn, will answer nothing in their own prejudice. Ordered that the clerk of the company, and such principal members as the plaintiff shall think fit, answer on oath, and that a Master settle the oath. (1)

(1) So in the case of the *East India Company*, an officer of the company was made defendant to a bill for discovery of orders and entries in the books of the company, and demurrer over-ruled, *Wych* v. *Meal*, 3 P. Wms. 310. Et vide *Moodalay* v. *Morton*, 1 Bro. Ch. Rep. 469. If a corporation will examine any of their members as witnesses, they must (and so is the course) disfranchise them, and then they may make use of their testimony, Mayor of *Colchester* v. ———, 1 P. Wms. 595.

[118] ESTWICK *versus* CONNINGSBY.

Case 105.

Eodem die.

Eq. Ca. Ab. 370, pl. 2. S. C.

Surviving partner trading on his own account with the debtors to the partnership. Ordered, that an attorney be appointed to sue for the debts, unless the surviving partner would give security to answer a moiety of the debts to the administratrix of the deceased partner.

THE plaintiff's late husband (to whom she is administratrix) and the defendant being co-partners for many years in the trade of a druggist, the plaintiff's bill was to have a discovery of the estate, and her proportion and dividend thereof according to the articles of co-partnership. The defendant answered; and it appearing that many debts owing to the joint trade stood out, it was now moved on the behalf of the plaintiff, that an able attorney might be appointed to sue for and recover these debts; it being alleged in the bill, that the defendant carrying on a distinct trade for himself, with the persons that were debtors to the joint trade, to oblige them he forbore to call in their debts, and it was ordered accordingly, unless the defendant within a week would give security to the plaintiff to answer her moiety of the debts that were standing out. (1)

(1) Reg. Lib. 1682. A. fol. 253. 384. The order was that "*Ralph* "*Grange* therein named should be "appointed to sue for and get in the "several debts owing to the partner-"ship, and that the defendant should "deliver to him all bills, bonds, and "notes for such debts, and also pro-"duce the books of account, concern-"ing the said trade, unless the de-"fendant would, within a week next, "give security to answer one moiety "of such debts to the plaintiff." And it appears also to have been referred to

the *Master*, "to direct an appraisement of the estate and goods belonging to the said co-partnership, and payment of the debts due from the partnership thereout, and if any overplus, then a moiety thereof to be paid to the plaintiff by the defendant, or otherwise to assign such debts standing out to the plaintiff as the *Master* should direct, and the *Master* was to have all books, papers, &c. produced on oath, and to accomodate all matters in dispute between the parties *if he could.*"

BURDETT *versus* ROCKLEY.

Case 106.
16 *January.*
In Court.
Lord Keeper.
Eq. Ca. Ab. 218, pl. 5. S. C.

After a decree for a personal duty a sequestration issues, and then the defendant marries and dies. If the sequestration shall take place of the wife's dower. *Vid. post Case* 157.

On a demurrer; the plaintiff's bill was to revive a sequestration obtained against the defendant's husband for a personal duty before his intermarriage with the defendant, and to avoid the defendant's estate in dower in the lands, that were sequestered before the marriage, it being insisted that these lands were so bound by the sequestration, and covered therewith, that the defendant's right of dower could never attach them. (1)

To this bill the defendant demurred, and the demurrer was allowed by the *Lord Keeper*. (2) And the counsel at the bar desired to know his Lordship's opinion, whether the heir in fee-simple should in such case have the estate bound, and subject to such a sequestration, or not? But the *Lord Keeper* refused to declare his opinion therein, saying, that case was not now before him. [119]

(1) Vide *Burdett* v. *Rockley*, ante 58. S. C. and cases cited in not. there.

(2) And an injunction that had been obtained dissolved.

ARCH-BISHOP of YORK *versus* . . . . . .

Case 107.
18 *January.*
In Court.
Lord Keeper.
Eq. Ca. Ab. 415, pl. 2.

No writ *de cautione admittenda* ought to issue, till affidavit filed, that the bishop refused to admit of caution.

Upon a motion made by Mr. *Bellwood* for a supersedeas to a writ *de cautione admittenda;* for that they had taken a writ to the sheriff without any affidavit filed, that the bishop refused to admit of caution, and for that reason a supersedeas was awarded. And the *Lord Keeper* declared, that

ARCHBISHOP OF YORK v. ....

finding this court often troubled for writs *de cautione admittenda*, he thought the right of it was, that if there was a sentence for a man to pay money, or to do any other thing in the spiritual court, a man ought first to perform that, before he is admitted to his writ *de cautione admittenda*. (1) For it is in vain to take security *parere mandatis ecclesiæ*, whilst a man refuses to obey the sentence. *Sed Quære.* For suppose a man be excommunicated for not coming to church, or not receiving the sacrament; how can he do that, till his caution is admitted and he absolved?

(1) This is a writ that lieth to a Bishop (where one taken by force of the writ *de excommunicato capiendo* offereth sufficient pledges or caution to obey and submit to the ecclesiastical law for the future) to admit the caution, and to deliver him; it may be directed to the ordinary himself, to command him to be delivered, which the ordinary may do by word. Wood's Inst. 563-4. Vide also writ *de excommunicato deliberando*, ibid. page 565.

Case 108.

Eodem die.

ANONIMOUS.

Eq. Ca. Ab. 236, pl. 8.

An executor pleads, he has no assets *ultra* 100*l.* to three several actions. Judgment is had in each for 100*l.* upon which he brings his bill, and moves for an injunction, which is denied.

UPON a motion made by Mr. *Stedman*, where three several actions at one time were brought against an executor, and he to each action pleaded *riens entre mains ultra* 100*l.* and so upon each action there was a judgment for 100*l.* and therefore prayed an injunction, but it was denied by the *Lord Keeper*. In cases proper for law a man must defend himself by legal pleadings; and every executor ought to be careful in the first place to cover all his assets with a judgment. (1)

(1) Vide *Blackall* v. *Combs*, 2 P. Wms. 72, where court seems to have admitted that in matters of mispleading only, equity will not relieve. So bill for relief in mispleading at law dismissed on appeal, *Stephenson* v. *Wilson*, post 2 vol. 325. So *ex parte Goodwin*, post 2 vol. 696. Sed vide *Robinson* v. *Bell*, post 2 vol. 146. It seems on the whole there may be cases in which equity will relieve, after a verdict in a matter where the defendant at law might properly have defended himself, Countess of *Gainsborough* v. *Gifford*, 2 P. Wms. 425. [See *Stevens* v. *Praed*, 2 Ves. jun. 519. *Bateman* v. *Willoe*, 1 Sch. & L. 201. *Ware* v. *Horwood*, 14 Ves. 31. *Protheroe* v. *Forman*, 2 Swan. 227.]

ANONIMOUS. Case 109.

Eodem die. Motion by the king's patentees for an injunction to stop the sale of English bibles printed beyond sea. Denied till the validity of the patent had been tried at law.

Upon a motion for an injunction to stop the sale of English bibles printed beyond sea, it was urged, that the *Chancery* was a Court of State, and therefore for the great mischief that might arise from these bibles, if they should be suffered to be publicly sold, the sale ought to be prohibited by this court, upon that politic account, as well as to quiet the King's patentees in their possession.

Lord Keeper. I do not apprehend the *Chancery* to be in the least a Court of State: neither can I grant an injunction in any case, but where a man has a plain right to be quieted in it: (1) and, though the patent for law-books has been adjudged good in the *House of Lords*, yet that is not exactly the same case with this, though near it.

Let there be a trial at law, and let the King's patentees be plaintiffs, and the defendants admit they have sold *twelve* bibles. And when the trial is over, come back again. (2) *Vid. post Case 274.*

(1) *Company of Stationers* v. *Parker*, Skinner 233. *East India Company* v. *Sandys*, post 129. *Hills* v. *Universitat. Oxon.* post 276. *Millar* v. *Taylor*, 4 Burr. Rep. p. 2400. But it seems this Court will, under circumstances, grant or continue an injunction to the hearing, where the title is not clear at law, vide the *Universities of Oxford and Cambridge* v. *Richardson*, 6 Ves. 706-7. In which case defendant imported bibles from *Scotland*, but only such as were printed by or for the King's printer there, and injunction continued to the hearing.

(2) Vide *Company of Stationers* Case, 2 Chan. Cas. 76. 93.

ANONIMOUS. Case 110.

23 January. In Court. Lord Keeper

Upon a motion for an injunction to stay proceedings on a bond, upon offer made to give judgment with a release of errors; but the *Lord Keeper* answered, that he did not think that so beneficial an offer as might be looked upon; for that notwithstanding the release of errors the plaintiff might bring his writ of error and put the defendant to plead his release, and so delay time as long as if no release of errors had been given.(1) But upon the plaintiff's offering

(1) Where the plaintiff shall by writ of error recover, or be restored to any personal or real thing, a release of all actions personal or real, as the case may

ANONIMOUS. to be bound by order to bring no writ of error an injunction was awarded.

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be is a good plea, Co. Litt. 288 *b.* for diversity between action and writ, vide Co. Litt. 288 *b.* and 2d. Inst. 40. But it seems that a release of all suits is a bar to a writ of error, for a writ of error is a suit, *Cole's* case, Latch. 110.

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[121]

Case 111.

Eodem die.

In Court.

Lord Keeper.

Agreement to quit the possession of land will not oblige a man to convey.

GERRARD *versus* VAUX.

THE bill was to have an execution of an agreement. But upon the proof it appearing, the agreement was only, that the defendant would quit the possession of the lands, and not that he would convey all his estate in those lands, the bill was dismissed. But the *Lord Keeper* said, if the agreement had been to have conveyed those lands, although he was not apprised what estate he had in them, yet he should have decreed the agreement. (1)

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(1) This point does not appear in the Register's Book, the case stated there is as follows: "One *Shaftoe* "being seized in fee of certain lands, "&c. in *Kent*, devised the same to "his sister *Margaret*, then the wife of "*Robert Hall* and her heirs. *Hall* "died leaving issue by *Margaret*, "*Thomas Hall. Margaret* afterwards "married the defendant *Vaux*, and "died without issue by him in Aug. "1670. *Thomas Hall* died an infant, "and without issue, possessed of a "personal estate, 300*l.* which *Vaux* "got into his possession. The plain- "tiffs claiming under *Shaftoe* the ori- "ginal testator obtained letters of ad- "ministration of *Thomas Hall's* ef- "fects, and filed a bill in the ex- "chequer against *Vaux*, for an ac- "count of real and personal estate, "it was then agreed that if the plain- "tiffs would relinquish the adminis- "tration, and dismiss the bill, and "pay *Vaux* 60*l.* that he would deli- "ver up to them possession of the "premises, late *Hall's*, and attorn to "them, and would convey, &c. to "plaintiff, and one *Ruth Shelly*, who "claimed a moiety, and give a bond "in penalty of 1,000*l.* for perform- "ance, but *Vaux* continued in pos- "session." *Vaux* by his answer ad- mitted the above case in substance, claimed to be intitled to a moiety of the lands as tenant by the curtesy, and agreed to account, and the decree was "That the defendant *Vaux* do forth- "with deliver up to plaintiffs, and "the defendant *Henry Shelly*, who "claimed under the original testator, "the messuages and lands in *Town* "*Malling*, late *Margaret Hall's*, "(being the premises in question) to- "gether with lands mentioned to have "been purchased by him of one Sir "*John Rayney*, and comprised in the "said agreement, and do account for "and pay to the plaintiffs the rents "and profits received by him," Reg. Lib. 1682. A. fol. 217. Afterwards the cause came on to be re-heard, when it appeared that the lands of *Margaret Hall* were gavelkind lands, and that *Vaux* claimed according to the custom to be intitled to a moiety thereof, as te- nant by the curtesy, and that he did not agree or intend to deliver up pos-

session of his moiety therein, and the former order sought in that respect to be reversed, and on this re-hearing it was ordered, "That the former order "should be so far rectified, and that "defendant *Vaux* should account only "for one moiety of the profits of the "gavelkind lands, and that he should "hold and enjoy the other moiety there-"of, according to the custom of *Kent*, "and plaintiffs to account for what "profits they might have received out "of the gavelkind lands, with these "alterations, the former order was to "stand, and no costs given." Reg. Lib. 1682. A. fol. 903.

CURSON *versus* AFRICAN COMPANY.

Case 112.

Eodem die. In Court. Lord Keeper.

Want of parties.

It was objected against the plaintiff, that he had not brought proper parties to hearing, the bill being to be relieved for a debt owing from the Old *African* Company, and they had brought to hearing the New *African* Company only.

The *Lord Keeper* objected, that the old company were in a manner *in nubibus*, though their charter was not surrendered, as was objected at the bar, for he knew how that matter was. The old company were almost two hundred thousand pounds in debt; so that their credit was lost, and they could not carry on their trade; and therefore, that the trade might not be lost to the nation, it was necessary that a new company should be erected, which was so done; and the King accepted no surrender from the old company of their charter; but they are a company still in being: the new company (which in truth are almost all the same men as were of the old company) bought the old company's stock and effects at the true value, and the money was to be applied for payment of the debts of the old company: but that, which stuck with him in this case, was, he did not see how [122] a company that had no estate could be compelled to appear. (1) Upon which it was urged, the plaintiff might take out a *distringas* against the company, and have it returned *nihil*, and so get a sequestration against them; and then by the course of the court the plaintiff need not to bring them to hearing. (2) But then for the plaintiff it was

(1) Vide the case of Dr. *Salmon* v. *Hamburgh*, cited in *Harvey* v. *East India Company*, post 2 vol. 396. Where said the members in their private persons were made liable, the company having no goods, but the editor has not been able to find any further report of that case.

(2) After a decree against a corporation for a sum of money, and a *distringas* issued out against them, they were not to have any time to be examined on interrogatories, *Harvey* v. *East India Company*, ub. sup.

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said, that the plaintiff had an order made in this cause that the defendants should take no advantage at the hearing for want of proper parties: to which it was replied, such an order was in itself void, and could not take away the defendant's just exceptions, unless it had been by consent.

Lord Keeper ordered the plaintiff's counsel to go on and open the cause: and after debate the plaintiff agreeing to take, as other creditors had done, 40*l. per cent.* with interest for his money, he was ordered so to do: and was likewise ordered to allow 100*l.* debt that was owing by him to the company: for that it is the custom of companies, that if they owe a man 100*l.* they will give him credit for so much; and therefore in respect of a company, stoppage is to be allowed as a good payment. (1)

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(1) Reg. Lib. 1682. A. fol. 291. and before the statutes stoppage has also been allowed as payment in cases where there have been mutual dealings between two persons in the way of their trade, per Lord *Macclesfield*, *Downam* & *Al.* v. *Matthews*, Pre. Ch. 581. So said to be adjudged by Lord *Hale*, where one of the parties became bankrupt, *Chapman* v. *Derby*, post 2 vol. 117. Et vide on that head *Peters* v. *Soame*, ibid. 428. So at law under the statute 5 Geo. II. cap. 30. sect. 29. As in the common cases under 2 Geo. II. cap. 22. sect. 13. *Lock* v. *Bennett*, 2 Atk. 48. And though stoppage is no payment in law or equity, (sed vide statutes) yet the least evidence of an agreement for stoppage will do, *Jeffs* v. *Wood*, 2 P. Wms. 130. But the dealing must be mutual, and the debts due in the same rights, *Meliorucchi* v. *Royal Exchange Assurance Company*, Eq. Ca. Ab. 9, pl. 8. *Lee* v. *Carter*, 2 Atk. 84. *Bishop* v. *Church*, 3 Atk. 691. stat. 2 Geo. II. cap. 22. sect. 13. *Medlicot* v. *Bowes*, 1 Vez. 208. *Whitaker* v. *Rush*, Amb. 407, where the law and principle of this point are stated by *Master of the Rolls*. As to distinction between law and equity in the case of joint and separate debts, vide *ex parte Quinten*, 3 Ves. 248. The act of 5 Geo. II. does not extend to mutual credits, *Ryall* v. *Rolle*, 1 Atk. 185. 1 Vez. 375. S. C. But mutual credit comes within the equity of that statute, *ex parte Prescot*, 1 Atk. 230. *James* v. *Kynnier*, 5 Ves. 108. and cases there cited. Et vide 1 Cooke B. L. 565, *et seq.* Cullen. Bank. Law, 192, *et seq.* 471. stat. 2 Geo. II. cap. 22. sect. 13. 5 Geo. II. cap. 30. sect. 28. Vide the principal case more fully stated, Skin. Rep. 84. Note the words of the statute, 2nd Geo. II. are "Where "there are mutual debts between "plaintiff and defendant, or if either "party sue or be sued as executor "or administrator, where there are "mutual debts between the testator "or intestate and either party, one "debt may be set against the other, "and such matter may be given in "evidence, &c." Those of the 5th Geo. II. "That where it shall appear "to the said Commissioners, &c. that "there hath been mutual credit given "by the bankrupt, and any other per-"son, or mutual debts between the "bankrupt and any other person, &c. "The Commissioners, &c. shall state "the account between them, and one "debt may be set against another, "and what shall be due on the ba-"lance of such account, and on setting "such debts against one another, and "no more shall be claimed or paid on "either side respectively." [See further on the equitable doctrine of set-off, *ex parte Stephens*, 11 Ves. 24. *Ex parte Twogood*, 11 Ves. 517. *Ex parte Hanson*, 12 Ves. 346. 18 Ves.

232. 1 Rose, 156. *Ex parte Wagstaff*, 13 Ves. 65. *Bradley* v. *Millar*, 1 Rose, 273. *Addis* v. *Knight*, 2 Mer. 117. *Vulliamy* v. *Noble*, 3 Mer. 593. *Ex parte Ross*, Buck. 125. As to set-off in bankruptcy, see the stat. 6 Geo. 4. c. 16. s. 50.]

HARVEY *versus* MOUNTAGUE.

Case 113.

26 January. In Court. Lord Keeper. Vid. ante Case 53.

The case was, Mr. *Harvey* being possessed of a great personal estate died, and made the plaintiff Sir *Thomas Harvey* and Mrs. *Elizabeth Harvey*, his widow, executors, and directed by his will that 20,000*l.* of his personal estate should be invested in lands, and that Mrs. *Harvey* should receive the profits thereof for her life, and made Sir *Thomas Harvey* residuary legatee.

Sir *Thomas Harvey* exhibited a bill against Mrs. *Harvey* setting forth that he was residuary legatee, and yet Mrs. *Harvey* had got the whole estate of the testator into her hands, and converted it to her own use. [123]

Mrs. *Harvey* insisted on a deed made during coverture, whereby the greatest part of her husband's estate was settled in trust for her. But Sir *John Coell* deposed, that this settlement being made in the late times was contrived only to prevent sequestration; and that cause coming on to be heard, she was decreed to account to Sir *Thomas Harvey* for the personal estate, and that the deed of trust should be set aside, and she should receive no more of the testator's estate; upon which she goes into *France*, and refuses to perform the decree, and was under a sequestration: afterwards Sir *Thomas Harvey* exhibits a bill against the now defendant Mr. *Mountague*, setting forth, that he owing 10,000*l.* and interest on a mortgage to Mr. *Harvey* the testator, and that Mr. *Mountague* knowing of the former decree, and having been present at the hearing of that cause, and at the time when the said decree was pronounced, had since, with an intent to elude and avoid the decree, paid this money to Mrs. *Harvey*, as he pretended: whereas if he had paid the money, it was with notice and after the former decree, and therefore it was prayed, that Mr. *Mountague* might pay this 10,000*l.* with interest.

The defendant insisted, that he had paid and fully satisfied all the mortgage money on such a day in *July*, which was in

HARVEY v. MOUNTAGUE

time subsequent to the decree; and that he having paid it to a person, that in law was well intitled to receive it, and having a legal discharge for the same, and being no party to the former decree, nor bound by it, nor ever served with any order upon it, he ought not in a court of equity to be compelled to pay it over again.

This cause came on to be heard before the Lord Chancellor *Nottingham*, in *Michaelmas Term* last, and the proof on behalf of the plaintiff being, that the defendant Mr. *Mountague* [124] was an intimate acquaintance of Mrs. *Harvey's*, and one with whom she advised in the management of her affairs; and that he was present in court at the time of the decree pronounced, it was therefore held by the *court*, that this was no good payment: though for the defendant it was insisted, that this was no legal notice to Mr. *Mountague*; that he was no party to the former decree, nor bound by it, (1) nor was ever served with any order upon it: and that he now having really paid his money (as the same was fully in proof) and having a good and legal discharge for it, it was a very hard and strange demand in equity to compel him to pay it again: and in truth that clause in the order, that Mrs. *Harvey* should receive no more of the testator's estate, was inserted in the decretal order by the clerk, who drew up the decree, and was not in the minutes; nor directed by the court: and the decree is not, that no person shall pay any money to Mrs. *Harvey* (for that in itself would be a void clause to all that were not parties to the decree) but only, that she should receive no more: and if Mr. *Mountague* be decreed to pay this money to the plaintiff, he will not only be decreed to

(1) None are bound by a decree but such as are parties to the suit, *Natchbolt* v. *Porter*, post 2 vol. 112. Sed vide *Brown* v. *Booth*, ibid. 184., where the decree was, that all the miners in *A.* should pay a tithe of lead ore, and on *sci. fac.* "All the miners in *A. for* "*the time being or to come*, are bound, "for they are within the letter of the "decree." And in a case where several causes were brought to a hearing together, and some that were parties to one suit were not so to another, per *Finch*, Ch. "The justice which was to be "done on them all appeared, and it "was decreed accordingly, and you "shall not sever them now," and so decreed against one that was no party to that suit, *Anon.* 2 Ch. Ca. 234. And *Tothill*, page 123, mentions an old case of *Chapman* v. *Bissow*, 23 and 24 Eliz., where a decree was against a lessee, *and all claiming under him*, he surrenders to him in reversion, and he was adjudged to be bound by the decree, for so long time as the lease should have endured. Sed vide *Iveson* v. *Harris*, 7 Ves. 251, and particularly p. 256 of that vol. where per *Eldon*, Lord Chan. "I have no "conception that it is competent to "this court to hold a man bound by "an injunction, who is not a party in "the cause for the purpose of the "cause."

pay his money twice, but in truth the plaintiff will have a double satisfaction decreed him: for by the former decree Mrs. *Harvey* is to account to him for all moneys by her received, and is now under a sequestration for it: and in truth the plaintiff has received satisfaction for it by the sequestration, having under it not only received the profits of the 20,000*l.* which she was to receive for her life; but also the profits of 1,500*l. per ann.* which is her own land of inheritance; and that therefore these decrees were repugnant, and did fight with one another.

But notwithstanding all that could be said, the payment to Mrs. *Harvey* was decreed to be an ill payment; and it was referred to a Master to take the account.

After this the plaintiff got a report *ex parte*, and Mr. *Mountague* having petitioned, and moved by his counsel for a re-hearing, was denied it: and then he moved to go back [125] to the Master (this being but a report *ex parte*) which at last was obtained: and it being alleged, that Mr. *Mountague* had paid Mrs. *Harvey* some money for her necessities before the first decree, it was directed that what he had really paid, before the decree, of the principal or interest should be allowed him on account, and his own oath to be taken as to the interest.

When he came before the Master, he proved that he had actually paid 7,500*l.* of the principal money, even before the first decree pronounced; and the Master made his report to that effect.

And now the matter coming before the *Lord Keeper* upon exceptions to the Master's report, the proofs for the defendant were made by one Mr. *Phalizo*, that the defendant, just before he was recalled from his embassy in *France*, had returned thither 5,000*l.* in money, which was left in *Phalizo's* hands, and had raised by the sale of the furniture of his house there the sum of 2,500*l.* more, which was likewise left in *Phalizo's* hands, and that the defendant Mr. *Mountague* had bills from *Phalizo* for payment of this money; and that Mr. *Mountague*, before the first decree pronounced, gave orders to Mrs. *Harvey* to receive this money of *Phalizo*, who swore, that thereupon he became her pay-master; and that afterwards in time subsequent to the first decree, (1) Mr. *Mountague* gave new orders or bills to Mrs. Harvey to

(1) The first decree was made 23d. Nov. 1680, and the bills delivered in April, 1681, R. L.

HARVEY v. MOUNTAGUE

receive this money; and that thereupon, she having occasion for it, he did actually pay it to her, and she with her own hand indorsed on the counter-part of the mortgage the receipt of this money.

Hereunto for the plaintiff it was objected, that the defendant could not be admitted to this proof, it being contrary to his own oath, who in his answer had sworn the money paid on such a day in *July*. 2*dly*, that *Phalizo's* deposition ought not to be read in this case; for that he before
[126] the hearing was examined in chief upon an interrogatory, that led him to discover the several times of the now pretended payments; and that therefore he ought not to be examined to the same matter again after the hearing; for now publication being passed, and the defendant seeing where the matter pinched, would supply it by straining of *Phalizo's* evidence. (1) If such a proceeding should be allowed it would occasion perjury, and especially in this case, where *Phalizo* has sworn the money paid in *July*. 3*dly*, admitting the case to be according to this new proof, yet in truth, this is no payment, for Mr. *Mountague* might have revoked his orders given to *Phalizo* for payment of this money to Mrs. *Harvey;* and the money was not actually received till after the first decree; and that bills of exchange are not assignable but by indorsement only; and it carries a suspicion with it, that there is no witness, either to the orders given to Mrs. *Harvey*, or to the indorsement on the mortgage deed; and the indorsement is not upon the original deed but on the counter-part remaining in Mr. *Mountague's* possession.

To this it was answered, that Mr. *Mountague's* answer and *Phalizo's* former depositions were very consistent with what was now proved before the Master, for though they swore the mortgage was fully satisfied and paid on such a day in *July;* yet great part of the money might have been paid before, as in truth it was, though the completing payment was not made till *July;* and that the plaintiff's counsel could not be in earnest, when they objected against *Phalizo's* being

(1) Vide *Jones* v. *Purefoy*, ante p. 47, and cases cited in note there, but where a witness was examined before the hearing, while she was interested, and after the hearing and decree for an account she released her interest, she was ordered to be examined again before the Master, and her depositions allowed to be read, *Callow* v. *Mime*, post 2 vol. 472. *Callow* v. *Mince*, (evidently S.C.) Pre. Ch. 234. And depositions taken while party disinterested ordered to be read, though the party deposing becomes afterwards intitled to the estate in question, *Gosse* v. *Tracy*, post 2 vol. 699. 1 P. Wms. 287.

examined after the hearing; for that was never denied in matter of account, and was so settled in the case of *Sandys* and *Davison* in the Lord *Hyde's* time upon long debate: and that Mrs. *Harvey* accepting of these bills, and *Phalizo* swearing he then became her paymaster, and her receiving the money upon them afterwards, makes this a good payment *ab initio*. That Mr. *Mountague* could not have so revoked his orders, but that Mrs. *Harvey* might have required payment thereof afterwards; and *Phalizo* might have justified his payment thereof: and as to the indorsement's [127] being made on the counter-part of the mortgage, the defendant's counsel conceived that was most proper; it being fit Mr. *Mountague* should have the evidence for the payment of his money in his own hands: and though there was no witness to it, yet it was fully proved to have been all writ with Mrs. *Harvey's* own hand: and it is an evidence of the sincerity of this payment, and that it was not done with a design to have served a turn; for if so, Mr. *Mountague* might have easily removed all these doubts. But the *Lord Keeper* allowed the exceptions to the Master's Report, and ordered Mr. *Mountague* to repay the whole money. (1)

(1) "Whereupon, &c. it appearing "that the said bills were not delivered "to Mrs. *Harvey* till April, 1681, his "Lordship declared that he could "not allow the 7,500*l.* to be really "and *bonâ fide* paid the 4th of Oct. "1680, but conceived the payment "not to be till April, 1681, aforesaid, and after the decree, and doth "think fit and so order that the said "exceptions do stand and be allowed, "and that the defendant do pay unto "the plaintiff the whole 10,500*l.* mentioned in the decree on the 2d of "May next," Reg. Lib. 1682. A. fol. 240. The reasons upon which the decree in this case is founded, do not appear, but it is apprehended they do not arise out of the doctrine respecting the rights of parties, as being subject to a decree. For the decree here, could not, it is conceived, in any sense, be said to bind any rights that were in the defendant, Mr. *Mountague*. By the payment of this money he did not become amenable to the process of the court, as in the case of contempt, nor was he clothed with any character which rendered him the subject of the service of an order founded upon the decree, it not appearing that he had even came in before the Master, *Bligh* v. Earl of *Darnley*, 2 P. Wms. 621. But the decree appears to be founded on the circumstances, and upon this broad general principle, which must govern the decision upon every other case, under circumstances of a similar nature, namely, that where a man wilfully pays money into a wrong hand, or a doubtful hand, he must abide the consequences, and that a court of equity will oblige all persons to take notice of its decrees, as much as of judgments, vide *Searle* v. *Lane*, post 2 vol. 37. On re-hearing ibid. page 88. *Sorrell* v. *Carpenter*, 2 P. Wms. 483. Sed vide *Worsley* v. Earl of *Scarborough*, 3 Atk. 392., where said by *Lord Chancellor* there is no such doctrine in this court that a decree made here shall be an implied notice, after the cause is ended, but it is the pendency of the suit that creates the

notice, *sed quære.* [See also Bishop of *Winton* v. *Paine*, 11 Ves. 194. *Metcalfe* v. *Pulvertoft*, 2 V. & B. 200. *Meux* v. *Maltby*, 2 Swan. 281. *Gaskell* v. *Durdin*, 2 Ba. & Be. 167. *Moore* v. *Macnamara*, ibid. 186. *Gore* v. *Stacpoole*, 1 Dow. 31.] On a suit commenced against a person having married a ward of the court clandestinely, he appeared in court, and presented an affidavit, stating expressly that he had no notice at the time of the marriage, that his wife was a ward of the court; *Eldon*, Lord Chancellor, nevertheless committed him to the Fleet, June 10, 1801. *Priestley* v. *Lamb*, Reg. Lib. 1800. B. fol. 860. Reg. minute-book, Trin. Term, 1801. Vide *Preston* v. *Tubbin*, post 286. and cases cited in not. there.

Case 114.

EAST INDIA COMPANY *versus* SANDYS.

27 January. In Court Lord Keeper.

Injunction denied to stay an interloper's trading to the *East Indies*, till the validity of the *East India* Company's patent has been tried.

The *East India Company* exhibited a bill against the defendant *Sandys* an *interloper*, setting forth their patent for the sole trade to the *East Indies*, and the great power that was thereby given them; and particularly the clause in the patent, that whosoever should trade thither, not being of the company, should forfeit the value of such goods and commodities wherein they should so trade: one moiety thereof to the company, and the other moiety to the King: but they were willing to wave their forfeiture: and setting forth what places and towns they had in the *East Indies*, and that they had there above 150,000 men under their Government; and that they had been at above 50,000*l.* charge in securing their trade in those countries, and that they had purchased divers privileges of the *Princes* there; and that the defendant, though he was not of the company, had traded thither with the plaintiff's money, and under their colours; and that by reason of his trading thither and bringing goods and merchandizes from thence, they had suffered great damage, and were forced to sell their goods at lower rates; and that the defendant ought to answer damages for the same. And that now to their further prejudice the defendant continued on his trade in the *Indies*, and had laded a ship called ——— with commodities to be transported thither, and prayed a full discovery, &c.

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To this bill the defendant answered, and demurred. By answer he denied he traded with the plaintiff's money, or under their colours; and that he did not know what had been done in the *Indies;* for that he was never there, &c. And for demurrer, that the bill tended to make the defendant liable to a forfeiture, as appeared by a clause in the com-

pany's patent set forth in their bill; and that of their own shewing, their patent was a *monopoly*, and in itself void, &c. And that he was not bound to discover whether he was sending any goods to the *Indies*, or what goods he had brought from thence, &c.

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This demurrer coming on to be argued before the *Lord Keeper*, for the plaintiffs it was insisted, that this was only an auxiliary bill for a discovery, in order to a legal trial; and that an answer could not hurt the defendant, for that the plaintiffs by their bill had waved the forfeiture. That the company had been of an ancient standing and long continuance, and their patents from time to time renewed, and confirmed by several succeeding *Kings*; and that the antiquity of their possession, which had not been till now of late interrupted by these interlopers, entitled them to the protection of this court; and that therefore it was but reasonable they should have an injunction for quieting of their possession, and that it was no *monopoly*, as was pretended, for that they always licensed people to trade to the *East Indies*, though they were not of their company, on payment of a reasonable proportion of the necessary charge and expence, which the company had been at for the support of their trade thither; and it was but natural justice they should so do, as in the case of *Sewers*, all are made to contribute, that receive benefit by what is done by the commissioners: and for precedents, they insisted on the case of the *East India Company* and *Foscue*, and the *Bookseller's* case; and that it was lately ruled in the *Exchequer*, in the case of the *sixty Chancery Clerks* on a bill to discover, whether they had paid the King's duty; and there, though the defendants demurred, as here, because it would subject them to a forfeiture, yet they were made to answer: and there has never any advantage been taken of such forfeitures: it is but like a *subpœna centum librarum*.

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But it was answered, there was a great difference betwixt *mandatory* writs and *patents* that create rights; and the plaintiffs saying in their bill, that they will take no advantage of the forfeiture, will not protect the defendant in an action at law: but if it would, the plaintiffs can waive but a moiety of the forfeiture, and cannot waive the King's moiety: and their patent must, as against them, be taken to be good, even in that clause of the forfeiture, though may be it is the weakest clause of it. And it was further insisted, that this patent was a *monopoly*, and the plaintiffs had very boldly in-

How far the plaintiffs by their bill waiving a forfeiture, when one moiety thereof belongs to the crown, will prevent a demurrer.

EAST INDIA COMPANY v. SANDYS.

serted it in their bill, and suggested, that by reason of the defendant's trading to the *East Indies* they had been forced to sell their goods for little more than half what they were really worth; which shewed the oppression of this patent upon the people.

Lord Keeper. I must in this case be governed by law, and the validity of the patent is properly triable there; (1) and till it is determined there, I do not see, how I can grant an injunction; (2) though I am far from thinking the patent void, which has been confirmed by so many succeeding *Kings;* and since there have been divers Parliaments, that have taken notice of other matters, but never reflected on this patent as void or against law.

The reasons given, why this bill should not be answered, are chiefly *three.*

1*st.* That what the plaintiffs complain of is but in nature of a trespass, and for that they may have remedy at law:
[130] but to that it may be answered, in some cases even for a trespass a bill is proper enough in this court; as where by the secret contrivance of it a man cannot easily prove it; as for instance, if a man in his own ground digs a way under ground to my mineral, and the like: (3) and so in this case there is a difficulty as to the proof, the matters for the greatest part having been transacted in the *East Indies.*

The *second* objection is, that it tends to subject the defendant to a forfeiture. I do not think there is much in that; for I take it, the clause as to a forfeiture is the weakest clause in the patent; (4) and I believe many of the able counsel that argue for the company, never perused the bill; otherwise they would not have inserted some matters, that had been better left out.

Whether the patent to the *East India* Company be a *monopoly*, or only a regulation of trade.

3*dly.* It is objected, that this patent is a *monopoly.* Certainly in its creation it was only a patent of regulation; for at first all people were at liberty to come in; and patents for regulation of trade are exempted out of the statute: and if it be now reduced into fewer hands, and so become a

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(1) So vide *Hills* v. *Universitat. Oxon.* post 275.

(2) Vide *Anon.* ante 120. and it is a common rule that equity shall not be applied to for the purpose of establishing a legal right, unless plaintiff has tried his title at law if he can, although it does not always prevail, *Mayor of York* v. *Pilkington*, 1 Atk. 284.

(3) Vide *Tilley* v. *Bridges*, Pre. Ch. 252. *East India Company* v. *Evans*, post. 308. Earl of *Kildare* v. *Eustace*, post 429, 438.

(4) Clauses to restrain trade under forfeitures, have often been adjudged void, vide post 307.

monopoly, it is hard to say when it became such. It is like the vastness of the buildings in *London* becoming a nuisance: no one can say when first they became so, or which particular house first made it such. And it is to be observed the words of the statute of *monopolies* are, that there shall be no *monopoly* within this kingdom. What influence that may have on this case is worthy consideration. I would therefore have this matter first tried at law, and for that purpose let the defendant admit, that he has bought and sold *East India* goods, that he brought from thence, to some certain value; and when the trial is over, come back again; and if the trial go against the defendant, he shall perfect his answer on interrogatories: but in the mean time let the defendant put in an answer without oath, that thereby the complainants may be entitled to the benefit of a commission to the *Indies* to examine their witnesses there. (1)

EAST INDIA COMPANY v. SANDYS.

Vid. the case of the *East India* Company against the interlopers. 2 Ch. Ca. 165.

(1) Note that on an action brought in B. R. in 1683, 35th Car. II. after several arguments Lord *Jefferies*, on great deliberation, gave judgment for the plaintiffs. Vide State Trials, vol. 7, 493.

GRAHME *versus* GRAHME.

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Case 115.
29 *January.*
In Court.
Lord Keeper.
Whether bonds of resignation are simoniacal.

UPON a motion to dissolve an injunction granted to stay proceedings in an action on a bond given by an incumbent to his patron, that he (the incumbent) should resign on request, *Lord Keeper* said, he was not satisfied, that such a bond was good in law: the precedents that were in the case were not directly to the point, whether such bonds are simoniacal or not: he therefore directed that the plaintiff should declare on this bond, and the defendant plead simony, and after that and judgment at law come back to the court. (1)

(1) Vide *Jacob's* Law Dictionary, *Tomlin's* edit. Tit. Simony, for an abstract of the reasoning and decisions on this subject. It is now, however, at rest, and general bonds of resignation are declared to be simoniacal, *Bishop of London* v. *Ffytche*, determined on appeal by the House of Lords, Bro. Par. Ca. 8 edit. Tit. Clergy, Ca. 3. And fully reported in *Cunningham's* Law of Simony, p. 52.

Case 116.

DOMINUS REX *versus* CARY.

Eq. Ca. Ab. 129, pl. 9. S. C.

Vid. ante Case 51.

This court will not allow writs of error in the *King's Bench* upon judgments in the petty bag.

Dy. 315 *a.* 4 *Inst.* 80

In a cause on the *latin* side, on a motion that the defendant *Cary* might stand committed for not vacating his letters patent of *reprizals*, it was moved by Mr. *Wallop*, that they might be at liberty to bring a writ of error in the *King's Bench*. And cited *Dyer*, &c. But the *Lord Keeper* said, all those books were founded only on the single opinion of my *Lord Dyer*, and that he thought the *Jurisdiction of Chancery*, even of the *latin* side, not subjected unto, nor to be controuled by the *King's Bench;* and that he would enjoin all such writs of error. (1)

(1) But note that in the case of *Foxwith* v. *Tremain*, 1 Vent. 102, one of the points there resolved by the Court of King's Bench was, that a writ of error did lie out of the petit bag into B. R. on an error in fact.

Case 117.

ANONIMOUS.

Enrolment of a decree may be opened, if the enrolment was gained by surprise, or there is some irregularity in it.

Upon a motion for a rehearing of a cause, where the decree was signed and enrolled by the late *Lord Chancellor*, the *Lord Keeper* asked Serjeant *Maynard*, if he knew any law, whereby he could justify the rehearing of a cause signed and enrolled by his predecessor, for that was to vacate a record. (1) The *Lord Chancellor* himself was master of his own enrolments, and might upon his memory know some reason for rehearing of it; but he could not do it without there was some surprize, or other irregularity in the enrolling of it: (2) but he said, he had a privy seal that

(1) Regularly an inrolment prevents a re-hearing, *Barney* v. *Tyson*, 2 Vent. 359.

(2) It should seem that in the ordinary case of inrolment it cannot be reversed but by appeal to the Lords, or bill of review, Harr. Ch. Prac. vol. 1, 442. Yet the opening of inrolments of decrees was considered as discretionary in the court, *Kemp* v. *Squire*, 1 Vez. 207. So inrolment although strictly regular vacated on motion having been made too quickly, and as it were by surprise, *Anon.* 1 Vez. 326, set aside on original bill, as having been obtained by gross fraud, *Lloyd* v. *Mansell*, 2 P. Wms. 73, and cases cited in not. there. Mitf. Tr. p. 73. Sed quære, how far it is so considered now, for decree, though obtained by fraud, and not inrolled, refused to be set aside on petition, *Mussell* v. *Morgan*, 3 Bro. Ch. Rep. 74. Et vide *Bradish* v. *Gee*, Amb. 229. *Pickett* v.

enabled him to sign and enrol the decrees pronounced by his predecessor.

Loggon, 5 Ves. 702. [*Charman* v. *Charman*, 16 Ves. 115. *Robinson* v. *Newdick*, 3 Mer. 13. *Stevens* v. *Guppy*, 1 Turner, 178.]

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FRANKLIN *versus* THORNEBURY: *& è contra.*

Case 118.

29 *January.*
In Court.
Lord Keeper.

A VOLUNTARY deed cancelled, and the lands being devised for payment of debts, and debts paid under the will: Q. Whether equity will relieve in such a case, since the testator himself could not avoid such a voluntary deed. (1)

Eq. Ca. Ab. 282, pl. 2. S. C.

In the same case, an agreement, being void as against an infant, yet was decreed; the infant having received interest under it after he became of full age. (2)

An agreement by an infant decreed against him, he having received interest under it, after he came of age.

(1) Vide *Bacon's* Tracts, 310. *Bold* v. *Corbett*, Pre. Ch. 84. *Villers* v. *Beaumont*, ante 100, and cases cited in not. there.

(2) As to the general doctrine of infant's contracts, vide cases collected in Fonbl. Tr. Eq. B. 1. Ch. 2. § 4. And an infant in equity may be bound by an offer made in his answer, if delay is thereby occasioned, *Cecil* v. *Com. Salisbury*, post 2 vol. 224. *Quære*, if he might not redeem himself by applying to the court, on attaining his age, ibid. So by fair acts done in confirmation of acts under infancy, Earl of *Chesterfield* v. *Janssen*, 1 Atk. 354. *Brooke* v. *Galley*, 1 Atk. 35. *Smith* v. *French*, ibid. 246. *Crowe* v. *Ballard*, 3 Bro. Ch. Rep. 120. So if conusant of his right, Lord *Teynham* v. *Webb*, 2 Vez. 212. So by his marriage settlement, *Harvey* v. *Ashley*, 3 Atk. 607. *Williams* v. *Williams*, 1 Bro. Ch. Rep. 152. So by covenant of his adult wife, in respect of her real estate, settled to uses, *Slocombe* v. *Glubb*, 2 Bro. Ch. Rep. 545. So by bond, *Hampson* v. Lady *Sydenham*, Nels. Ch. Rep. 55. And by covenant to settle a jointure, *Hollingshead* v. *Hollingshead*, 14 June, 1708. Cited and stated in *Coventry* v. *Coventry*, 2 P. Wms. 229. 1 Str. 604. Sed vide *Johnson* v. *Bayfield*, 1 Ves. jun. 314. So where bill brought by *Prochein Ami*, and not proceeded in till after infancy, and then dismissed, liable to costs, *Turner* v. *Turner*, 2 P. Wms. 297. And so said to be at law in case of a judgment, ibid. *Gregory* v. *Molesworth*, 3 Atk. 627. So by account taken under decree for redemption, *Mallack* v. *Galton*, 3 P. Wms. 352. So *Lyne* v. *Willis*, 13 May, 1730, cited in not. (B) there. So by a decree made for his benefit, unless fraud or collusion shewn, *Sheffield* v. Duke of *Buckinghamshire*, 1 Atk. 631. So his executor bound, ibid. Et vide Lord *Brook* v. Lord and Lady *Hertford*, 2 P. Wms. 519. And unless it regard real estate (in a cause) where a day given to infant to shew cause, Lady *Effingham* v. *Napier*, 2 P. Wms. 401, where said all decrees against infants give six months to shew cause. Nor shall infant's inheritance be bound by any discretionary act of the court, *Taylor* v. *Phillips*, 2 Vez. 23. Et vide *Rooke* v. *Warth*, 1 Vez. 461. And infant shall be bound by what has been done during infancy in respect of maintenance, *Gregory* v. *Molesworth*, 3 Atk 627. So by statute of limitations, where trustee, &c. has

neglected to sue, *Wych* v. *East India Company*, 3 P. Wms. 309. Not determined, but *Parker*, Lord Chancellor so of opinion, in the case of a fine and non-claim in favour of a purchaser, Lord and Lady *Huntingdon's* case, cited in not. 3 P. Wms. 310. Sed vide on this head *Allen* v. *Sayer*, post 2 vol. 368, where infant not bound by fine and non-claim, through laches of his trustee. As to the doctrine of inheritance of female infants being bound by marriage settlement, or by covenants or collateral acts relating thereto, it is much discussed, and the principles and cases referred to in *Caruthers* v. *Caruthers*, 4 Bro. Ch. Rep. 499. *Drury* v. *Drury*, in dom. proc. May 25, 1762, cited there. [S. C. 2 Eden, 39.] *Williams* v. *Chitty*, 3 Ves. 549. *Smith* v. *Smith*, 5 Ves. 189. *Clough* v. *Clough*, ibid. 710. [*Milner* v. *Harewood*, 18 Ves. 275. *Lecky* v. *Knox*, 1 Ba. & Be. 210.] And some difference as to the extent of the principle has arisen; the result of the authorities, however seems to be that a female infant cannot be bound in respect to her inheritance. And the grand broad principle that appears to have influenced Judges in their interpretation and application of the law and the rules of equity to the contracts of infants is two-fold, the nature of the transaction and the general convenience of mankind.

Case 119. WELDEN *versus* DUX EBOR': *& è contra.*

Eodem die.

Eq. Ca. Ab. 257, pl. 3. S. C. Fine levied by a mortgagee and 5 years *non claim* will not bar the mortgagor of his equity of redemption.

To a bill to redeem a mortgage, *Welden* had pleaded a fine with proclamations and *non claim* for five years. The plea was over-ruled, the mortgagee having a right to retain the land, till his money was paid; and this was a new way of foreclosing a man of his equity of redemption. (1)

(1) So if mortgagee disseised and disseisor levy a fine, and five years pass after the proclamations, though the mortgagee is thereby barred, yet if the mortgagor pays or tenders his money he has five years after to prosecute his right by the second saving in the 4 Hen. 7. c. 24. because his title did not accrue till payment of the money, *Stowell* v. Lord *Zouche*, Plow. 373. So mortgagor in possession cannot bar mortgagee by fine, *Focus* v. *Salisbury*, Hard. 400. Nor lessee continuing in possession as lessee for years, *Archbold* v. *Cook*, Noy. 23. *Freeman* v. *Barnes*, 1 Vent. 82. 1 Lev. 272, S. C. Earl of *Pomfret* v. Lord *Windsor*, 2 Vez. 482. Sed vide contra the principal case, *Lingard* v. *Griffin*, post vol. 2d, 189. So fine and non-claim bar to a bill of review, ibid. As to what persons' estates and interests are not barred by a fine in general, and on the savings in stat. 4 Hen. 7. cap. 24., vide Cruise on fines, p. 287, et seq.

Case 120.

Eodem die.

Eq. Ca. Ab. 122, pl. 6. S. C.

HARDHAM *versus* ROBERTS.

Defective surrender for the benefit of younger children supplied in equity.

ONE point in this case was, that a man having by his will made provision for his younger children out of some copyhold lands, but the surrender having been made into *the hands of one customary tenant only, the question was, whether this defect should in equity be supplied against the heir: and it was decreed for the plaintiffs, the younger children; there being many precedents in court of the like nature. (1)

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(1) Many of the numerous cases on this head are collected by Mr. Cox, in his notes on *Watts* and *Bullas*, 1 P. Wms. 60. And *Harris* v. *Ingledew*, 3 P. Wms. 98, in addition to which it appears, that surrender has been supplied to prevent remainders in marriage settlement from being defeated, *Nandike* v. *Wilkes*, Gilb. Eq. Rep. 114. So where surrender made but for want of presentment void at law in favour of mortgagee, *Taylor* v. *Wheeler*, 2 Salk. 449. *Cock* v. *Goodfellow*, E. 1723. So against a purchaser with notice in favour of mortgagee, *Jennings* v. *Blincorne* and *Others*, post 2 vol. 609. 1 Bro. Par. Ca. 244, by the name of *Blenkarne* v. *Jennens*. And in the like case in favour of a devisee a younger child, though otherwise provided for, where copyhold part of the provision. *Lloyd* v. *Burton*, 1 Bro. Par. Ca. 544, cited *Cook* v. *Arnham*, 3 P. Wms. 285, in note. So where surrender prevented by accident in favour of intended devisee, a nephew, *Parks* v. *Wilson*, 10 Mod. 515. So on a covenant to surrender, heir of covenantor decreed to surrender, *Neeve* v. *Keck*, 2 Eq. Ca. Ab. 24, pl. 25. 9 Mod. 106. So covenant on marriage, to surrender copyholds to wife for life, remainder to the issue, &c. or to leave wife 500*l.* at his death. *Wood* v. *Pesey*, 5 Vin. Ab. 547, pl. 36, for the covenant is a charge in equity, ibid. But where by accident surrender of lands in *Borough English* in favour of eldest son omitted, and the provision for youngest son was lost, court would not supply surrender, *Cooper* v. *Cooper*, post 2 vol. 265. Eq. Ca. Ab. 123, pl. 10. S. C. Nor where voluntary conveyance against the heir, *Vane* v. *Fletcher*, 1 P. Wms. 354. Contra it should seem if the heir had done any thing to prevent surrender, ibid. Nor in favour of natural daughter against the heir, under the ancestor's covenant for further assurance, *Fursaker* v. *Robinson*, Pre. Ch. 475. Gilb. Eq. Rep. 139. Cited in *Osgood* v. *Strode*, 2 P. Wms. 248. *Randal* v. *Randal*, ibid. 468. Et sic dict. per *Master of the Rolls*. *Crickett* v. *Dolby*, 3 Ves. 12. Nor where testator seized of freehold and copyhold lands, and devise of lands generally for payment of debts, and heir at law unprovided for, unless the freeholds are inadequate, *Attorney General* v. *Mott*, 2 Eq. Ca. Ab. 235, pl. 23. Contra where express devise of copyholds, ib. Nor where part only of the copyholds surrendered as to the other part, *Wilson* v. *Mount*, 3 Ves. 194. Sed vide *Banks* v. *Denshire*, 3 Atk. 585. 1 Vez. 63. *Allen* v. *Poulton*, 1 Vez. 122. Nor in favour of devisee though younger child, and claiming a provision, where the words of the devise doubtful, *Gascoigne* v. *Barker*, 3 Atk. 8. Sed vide *Banks* v. *Denshire*. *Allen* v. *Poulton*, ub. sup. Nor in favour of a grand-child, *Elton* v. *Elton*, 3 Atk. 508. *Perry* v. *Whitehead*, 6 Ves. 544. [Nor of a husband, *Moodie* v. *Reid*, 1 Madd. 516.] Further on this head, and as to the doc-

trine of provision for the heir, vide *Hills* v. *Downton*, 5 Ves. 577, but not decided on that point. [*Garn* v. *Garn*, 16 Ves. 268. *Rodgers* v. *Marshall*, 17 Ves. 294.]

Case 121.

5 *February.*

In Court.

Lord Keeper.

HULBERT *versus* HART.

Bond given by one parcener to pay to the other parcener, his executors or administrators, an annual sum during the life of *J. S.* for *owelty* of partition, shall go to the executor, and not to the heir.

COPARCENERS make a partition by consent; and the lands of the one being of greater value than the lands allotted to the other, until an estate for life fell in: it was agreed, that that coparcener who had the least share should have a rent of 20*l. per annum*, issuing out of the lands allotted to the other, to make his share equal, and a bond was given for securing the payment of it; but this bond for *owelty* of partition being made payable to him, his executors or administrators, the question was, whether the heir or executor should have the benefit of this bond.

It was admitted, if he had taken a sum in gross in consideration of the inequality of partition, that had been like selling so much of his part; but here the bond being to secure a growing payment, the heir that has the land ought to have the benefit of it.

Lord Keeper decreed it for the executor; and barely upon this difference, that here was no grant of a rent, (1) but a bare agreement, and so he had his election either to pay it or forfeit his bond. (2)

(1) Where a rent is granted for owelty of partition it will go as the land for which it is given as a recompence would have gone, Vid. 1 Inst. 169, b, and a parol agreement for partition of long standing, and put in execution established in this court, vide *Ireland* v. *Rittle*, 1 Atk. 541. So where part executed, *Alsopp* v. *Patten*, post 472.

(2) There is an entry of dismissal, with costs, to be taxed, Reg. Lib. 1682. A. fol. 229.

Case 122.

6 *February.*

In Court.

Lord Keeper.

MATTHEWS *versus* NEWBY.

Eq.Ca.Ab. 156, pl. 1.

THE bill being to have distribution of the legatory part of the personal estate of a citizen of *London* who died intestate; the defendant the widow and administratrix pleaded

A freeman of *London* dies intestate, leaving a wife and no child. Bill is brought against the widow, who was administratrix, for a distribution of the testamentary part. Defendant pleads that by the custom it belonged to her as administratrix and was not distributable by the statute. Plea allowed.

MATTHEWS v. NEWBY.

that by the custom of the city of *London*, if a freeman dies intestate and without issue, his widow ought to have her widow's chamber and a moiety of the rest of the personal estate, and the administrator the other moiety; and set forth the proviso in the act of distributions, that it should not prejudice the custom of *London*, and that administration of her husband's personal estate was granted to her.

It was affirmed by the counsel at the bar, that it had been lately resolved in the *King's Bench*, that the whole estate of a citizen of *London* was exempted out of the act of distributions. And thereupon the plea was allowed. But whereas the defendant had demurred, for that distribution ought to be made in the spiritual court, the *Lord Keeper* over-ruled the demurrer; for that the spiritual court in that case had but a lame jurisdiction; and there being no negative words in the act of parliament, he thought a bill for distribution very proper in this court. (1)

Note.—It was decreed by the Lord Chancellor *Jeffreys*, in *Trin.* Term, 1687, in the case of *Stapleton* and *Sherrard*,(2) where a man within the province of *York* was dead intestate, leaving a wife and no child, that the wife should have one moiety of the personal estate by the custom, and that the other moiety being without the custom should be distributed according to the statute of *Distributions*. (3)

(1) But in this respect the law is altered by stat. 1 Jac. 2. cap. 17. sec. 8, by which the share of administration of an intestate citizen of *London*, or Deadman's share is made subject to the Act of Distributions. Et vide Salk. 426. Note the orphanage share under the custom of *London*, is subject to debts, *Anderson* v. *Maltby*, 2 Ves. jun. 254, per *Loughborough* Chan.

(2) Post 465. Sed vide not. there.

(3) Reg. Lib. 1682. B. fol. 258. *Note.*—There does not appear any mention of the matter of the plea in the Register's Book.

HOWARD *versus* HOWARD.

Case 123.

Eodem die.

Bill for a distribution proper in this court.

BILL for a distribution of an intestate's personal estate. The defendant demurred, for that distribution of an intestate's personal estate is proper in the spiritual court, and not here.

The demurrer was over-ruled for the reasons in the last case. (1)

(1) And this court acts upon agreements relating to distribution of personal estate, *Cocking* v. *Pratt*, 1 Vez. 400.

Case 124.

DUNNY *versus* FILMORE.

Eodem die.
Eq. Ca. Ab. 81, pl. 7.
2 Ch. Ca. 133.
Nel. Ch. Rep. 64. S. C.

A BILL having been taken *pro confesso*, a bill of review was brought, and a demurrer having been put in to it, was allowed: and now a new bill of review being brought the defendant demurred, and for cause shewed, that a bill of review lies not after a bill of review: and the demurrer was allowed. (1)

A bill of review lies not, after a demurrer to a former bill of review allowed. *Vid. post Case* 126.

(1) Vide *Pitt* v. Lord *Arglass*, post 441. But if upon a bill of review a decree has been reversed, another bill of review may be brought upon the decree of reversal, 2 Ch. Pr. 633, cited Mitf. Tr. 71. sed vide *Barbon* v. *Searle*, post. 417.

Case 125.

EARL of ARGLASSE *and* MUSCHAMP.

Eodem die.
Eq. Ca. Ab. 133, pl. 2. 169.
C. pl. 1.
2 Ch. Rep. 266.
Vid. ante Case 70.
Vid. post Case 231.
12 Co. 114.
1 Ro. Ab. 374.

THE defendant *Muschamp* had petitioned the *Lord Keeper* for a rehearing of his plea to the jurisdiction of the court, and Mr. *Wallop* in arguing insisted much on the case of the *Company of Horners in London*, 2 *Rolls Rep.* 471, where this court would not meddle with the trust of lands in *Chester*, though the party was out of the jurisdiction of the county *Palatine*, and cited the Lord *Derby's* case; and therefore much less ought it to anticipate the jurisdiction of the *Chancery* of *Ireland*. *Sed non allocatur*. And the plea was over-ruled again, the *Lord Keeper* citing only *Preston* and *Archer's* case: and as to the objection, that this court was deficient in power in this case to compel a performance of its decree, because it could not sequester the lands in question, he looked upon that as an objection of no weight; and it did not appear to him, but the defendant might have other lands in *England*; and then those would be subject to a sequestration; and therefore over-ruled the plea. (1)

(1) And a commission for taking defendant's answer beyond sea granted. Reg. Lib. 1682. A. fol. 307.

PRICE *versus* KEYTE.

Case 126.

IN a bill of review you may add a new supplemental bill. (1)

Eodem die.
Eq. Ca. Ab. 80, (H.) pl. 2. S. C.
Ante Case 124.

(1) Sed *quære* without special leave of the court, *Anon.* 2 P. Wms. 284. *Mellish* v. *Williams*, post 166, and if any person, not a party to the original suit, becomes interested in the subject, he must be made a party to the Bill of Review by way of supplement, *Sands* v. *Thorowgood* and *Others*, Hard. 104. *Sed nota*, that was a bill filed against trustees, and a decree against plaintiff for payment of money which was paid, then some of the trustees were displaced, and other new ones put in, and then a bill of review by plaintiff in the original suit against the trustees that had the decree, to which bill of review the new trustees were not made parties, and on demurrer for that cause, the court seemed to doubt, but at last it was agreed that the new trustees should be made parties without prejudice. Et vide *Bacon's* Tacts, 279-280, Mitf. Tr. p. 71.

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ANONIMOUS.

Case 127.

IF a man by answer swears, that what he received, he received as a menial servant, and hath paid it over to his master, he shall not be put to account again: but he ought to disclose this matter in his answer.

A man swears he received money as a menial servant, and paid it over to his master.

He shall not account for it again. *Vid. ante Case* 81, *and post Case* 204.

HOBBS *versus* NORTON: *& è contra.*

Case 128.

SIR *George Norton's* younger brother having an annuity of 100*l. per annum*, charged on lands by his father's will, contracts with Mr. *Hobbs* for selling to him this annuity. Mr. *Hobbs* goes to Sir *George Norton*, and tells him he was about to buy this annuity of his younger brother, and desired to know of him, if his younger brother had a good title to it, and whether his father was seized in fee at the time of the making the will, and whether the will was ever revoked; Sir *George Norton* told him, he believed his brother had a good title to it, and that he had paid him this annuity

9 *February.*
In Court.
Lord Keeper.
Eq. Ca. Ab. 356, pl. 8. S. C.
2 Ch. Ca. 128.

Issue in tail under a settlement encourages a stranger to purchase an annuity of the younger son given by the father's will. Decreed to confirm the annuity.

HOBBS v. NORTON.

these twenty years, but withal told him, that he heard there was a settlement made of his father's lands before the will; and that the said settlement was in Sir *Timothy Baldwin's* hands, and that he had never seen it, and therefore could not tell him what the contents of it were, but encouraged him to proceed in his purchase; telling him, he had not only paid his brother his annuity to that time, but had paid to his sisters 3,000*l.* under the same will. Afterwards Sir *George Norton* gets this settlement into his hands, and would avoid this annuity, the lands being thereby entailed. *Hobbs's* bill was to have this annuity decreed, or repayment of his purchase money.

The cause coming on to be heard, there was no proof that Sir *George Norton*, at the time he encouraged *Hobbs* to proceed in this purchase, had any notice of this settlement. [137] But one witness swore, that Sir *George* promised to confirm the annuity to *Hobbs:* but that being but by one witness, and contrary to Sir *George Norton's* answer, was looked upon as no evidence; (1) it not being probable that Sir *George* should agree to confirm this annuity, for then he would have been made a party to the deed.

Lord Keeper decreed the payment of the annuity, purely on the encouragement Sir *George* gave *Hobbs* to proceed in his purchase, and that it was a negligent thing in him not to inform himself of his own title, that thereby he might have informed the purchaser of it, when he came to enquire of him: and therefore decreed Sir *George* to confirm the annuity to *Hobbs.* (2)

But as to the case between Sir *George* and his younger brother, that might admit of another consideration, being it was in proof in the cause, that the younger brother all along was knowing of this settlement, and therefore possibly

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(1) But this is not an universal rule, it seems to hold only where the facts denied by the answer are equally strong with those that are affirmed by the deposition, but in the case of a negative pregnant in the answer or circumstances corroborating against the denial contained therein, there the depositions of a single witness may prevail against the answer, *Walton* v. *Hobbs*, 2 Atk. 19. and cases cited in note there, vide also *Cooth* v. *Jackson*, 6 Ves. 40. dict. p. Lord *Eldon*, Chancellor.

(2) This was on a re-hearing so decreed, and defendant had a twelvemonth given him to elect to purchase the annuity of the plaintiff, six months only having been given him by the former decree, Reg. Lib. 1682. A. fol. 389. So this court will relieve against an entail fraudulently concealed, and then set up against a jointure, *Raw* and *Ux.* v. *Pole*, post vol. 2, 239, affirmed on appeal.

he should not have advantage of drawing in a stranger to purchase his title: but the cause between them not being ready for hearing, was left to come on, as it could, by the course of the court.

HOBBS v. NORTON.

Vid. Case of Bovey *and* Smith, *Case* 139.

PRODGERS *versus* PHRAZIER.

Case 129.

Eodem die.
In Court.
Lord Keeper.
Eq. Ca. Ab. 276, pl. 1. S. C.
Ante Case 7.

THIS day upon debating the matter before the *Lord Keeper*, he refused to change the possession, or to do any thing in it, until the validity of the patent was determined in a legal trial; and therefore directed the plaintiff to bring his ejectment *custodiæ* to be tried in the *King's Bench* next term: and the defendant to admit the plaintiff was once in possession. (1)

(1) It appears in this case that after the order for over-ruling the plea the plaintiff having waived the proceedings on the bill, had obtained an order for a new commission, *de idiota inquirendo*, and obtained an inquisition thereon to be taken, and the said *Bridget* again to be found an ideot, and obtained a new grant from his Majesty of her person and estate, and an order out of this court for an injunction to the defendant, and other the tenants of the estate, to deliver the ideot and her estate to the plaintiff, and also a writ of assistance to the Sheriff, for the purpose, and an order for an attachment against defendant and the other tenants, for not obeying the last-mentioned order. The *Lord Keeper* (this being on a re-hearing) ordered that all the before-mentioned orders for over-ruling the plea, &c. should be discharged, and directed a trial at bar, K. B. and in the mean time respited the judgment on the plea, Reg. Lib. 1682. B. fol. 264. The Court of King's Bench upon the issue adjudged the grant to be good, holding it to be a trust coupled with an interest, of which an infant is capable. In the debate of this case it was (*int. al.*) objected whether the grant of the custody of an ideot, will pass any interest to the executor of the grantee, because such a grant carries a trust with it, and that the King may have some knowledge and consideration of the grantee, but not of his executor. To which it was answered here was an interest coupled with a trust, as in the case of wardship formerly, which always went to the executor of the grantee, and which was of greater consideration in the law, than the feeding or clothing of an ideot, and of that opinion was the court, and that the King had a good title to dispose of both the ward and the ideot, one till he was of age, and the other during his ideocy. And it being objected in this case that the finding an ideot, *per spatium octo annorum*, was bad, for that the finding of an ideot ought to be *à nativitate;* it was answered and agreed to by the court, that the finding an idiot is sufficient, without the addition of any other words, and therefore *per spatium octo annorum* shall be surplusage, for in this case words are not so much to be regarded as the reason of the law, which doth not allow of ideocy, otherwise than *à nativitate:* judgment for the defendant, 3 Mod. 43. Vide also this case reported in K. B. 2 Show. 171. Skin. 4. 138. 177. Et vide *Dennis* v. *Dennis*, 2 Saund. Rep. 329. Lord *Donegal's* case, 2 Vez. 408.

Case 130. EXTON *versus* GREAVES.

Eodem die. In Court. Lord Keeper.

Eq.Ca.Ab.317, pl. 1.

After a decree to foreclose the mortgagor and some creditors, whose debts were charged on the estate, one of the creditors pays off the mortgage, and agrees with the rest, that they should redeem him at a further day, otherwise he should hold the lands absolutely. This gives the other creditors a new redemption; and accordingly a redemption decreed, though after 20 years possession and great improvements made,

J. D. having made a mortgage to *J. S.* and the mortgaged premises or the equity of redemption thereof being subjected to the payment of divers debts, the mortgagee exhibits his bill against the mortgagor and all the creditors, that they should redeem or be foreclosed. The cause was heard, and at the time the creditors and mortgagor were to pay the mortgage money or be foreclosed, the defendant *Greaves* by consent of the creditors (being a creditor himself) pays the money, and agrees with the creditors, that if they would pay his money at a further day, they should redeem him; otherwise that he should have the lands absolutely. (1)

The creditors fail to pay the money at the time agreed on. *Greaves* for 20 years together enjoys the lands, and lays out 800*l.* in building; and now the creditors exhibit their bill to redeem him. (2)

For the plaintiff it was insisted, that this was but a mortgage in *Greaves;* and that it did not stand upon the same foot as in the former decree; but that upon the later agreement there arose a new equity of redemption to the creditors.

For the defendant it was insisted, that he came in and stood in the place of the mortgagee, and if the mortgagee had not assigned to him, all these creditors had been foreclosed by the decree; and insisted on the length of time: and principally, that this was in no sort like the case between a mortgagor and a mortgagee: for there the mortgagee had

(1) It appears that pending or soon after the reference to the *Master*, several of the plaintiffs the creditors offered to redeem the premises, and the defendant *Greaves* being a creditor in his own name for 200*l.* voluntarily offered to plaintiffs and the rest of the creditors, that if he might be paid his whole debt he would redeem the mortgaged premises for the benefit of the plaintiffs, the rest of the creditors, after satisfaction of his own debt and the money he should really pay for redemption thereof; and he desired that he might alone treat with the heir of the mortgagor, and his trustees for the same; promising and agreeing, that if he might be permitted to redeem and buy in the mortgage, that the residue of the said mortgaged premises, after his own debt and what he should pay were satisfied, should go for the benefit of the rest of the creditors, R. L.

(2) As to length of time in cases of mortgage, vide *Newcomb* v. *Bonham*, ante page 7, and cases cited in note there.

EXTON v. GREAVES. [139]

a covenant for payment of his money, and a bond most commonly for performance of covenants: but here the defendant *Greaves* had no way to compel the creditors to pay him his money; and that a mortgage ought to be mutual: (1) as one may compel to receive, so the other may compel to pay: and it would have been looked on as superfluous and fantastical, for the defendant to have exhibited a bill to have foreclosed these creditors.

But the *Lord Keeper* decreed a redemption; (2) because these lands by the new agreement became a mortgage in respect of the other creditors in the hands of the defendant, and in regard of the trust and confidence which they had in the defendant, being all creditors alike: and principally because the mortgagee had assigned to *Greaves* his mortgage only, and not the benefit of the decree for foreclosing of the redemption: and directed an account to be taken, and the defendant to be allowed only necessary repairs and lasting improvements. (3)

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(1) So *Howard* v. *Harris*, post 192. Sed vide cases cited in note there.

(2) Vide *White* v. *Exer*, 2 Vent. 340.

(3) A plea and answer were put in of 20 years possession, and denying that *Greaves* promised to come to any account respecting the premises, unless his money was paid him by a day therein mentioned, Reg. Lib. 1682. A. fol. 452.

LORD KEEPER & Al' *versus* WYLD & Al'.

Case 131.

9 February. At the Rolls. Master of the Rolls and Lord Chief Justice Pemberton.

THE plaintiffs being mortgagees, the bill was to discover settlements, and what estate the mortgagor had in him. To this bill the defendants pleaded two several settlements, whereby the mortgagor was only tenant for life.

Eq. Ca. Ab. 38, pl. 9. S. C.

The plea was over-ruled, because the defendants did not offer by way of answer to admit the tenant for life to be dead; that so the plaintiffs might try the validity of these settlements at law; for if they should expect, till the tenant for life was dead, their witnesses, that could prove the fraud, might be likewise dead. Besides the defendants pleaded these settlements to be made after marriage, in pursuance of

Defendant pleads settlements made after marriage, in pursuance of an agreement made before, and does not shew what the agreement was. No good plea.

promises and agreements made before marriage, and did not set forth what those promises and agreements were. (1)

(1) So to bill charging facts of constructive notice, plea denying notice, but not answering facts disallowed, *Gerrard* v. *Saunders*, 2 Ves. jun. 187. The general rule appears to be that in pleading there is the same strictness in equity as at law, *Story* v. Lord *Windsor*, 2 Atk. 632. And must state positive facts and dates, ibid. *Edsell* v. *Buchanan*, 2 Ves. jun. 84. *Quære*, where plea and answer, whether charges in the bill must be met by averment in the plea, as well as the answer, *Price* v. *Price*, post 185. *Bayley* v. *Adams*, 6 Ves. 586.

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Case 132.
Eodem die.
At the Rolls.
Master of the Rolls.

BARKER *versus* WYLD and Two Others.

Eq. Ca. Ab. 35, pl. 4. S. C.

Bill against three for a joint demand, one of them by answer says, he believes and hopes to prove the debt paid. The cause is heard on bill and answer as to him.

THE plaintiff's bill was to have an account of goods delivered to the three defendants respective testators, who were factors. In this case there being three defendants, one whereof had by answer sworn, he believed and hoped to prove the plaintiff was satisfied his demands; the plaintiff replied to the other two only; and brought the cause on by bill and answer as against the other defendant.

The plaintiff could have no decree; but on payment of costs had leave to reply.

It was insisted, that the plaintiff in this case could have no decree: for having brought on his cause as against the third defendant on bill and answer only, his answer must be taken to be true: and though he does not directly swear the money paid; yet he says, he believes and hopes to prove it paid: but the plaintiff not replying to him, he is excluded of the benefit of his proof: and this was a cunning practice of the plaintiff to proceed against those defendants only who were ignorant of the matter, and to exclude the defendant who perhaps could have proved the debt paid.

The plaintiff was ordered to pay costs, and left at liberty to reply to the other defendant. (1)

In this case it was admitted, that if there are three joint factors, and a man has a demand against them jointly, a bill

(1) Where plaintiff replies but brings the cause to hearing, without rejoinder or rules given for publication, the answer shall be taken to be true, *Wrottesley* v. *Bendish*, 3 P. Wms. 237. *Darcy* v. *Chute*, 1 Ch. Ca. 21. Cited *Wyatt's* Prac. Reg. 375. *Sed quære.* Where by mistake a replication has not been filed, and yet witnesses have been examined the Court has permitted the replication to be filed, *nunc pro tunc*, and said even after a decree, *Rodney* v. *Hare*, Mosely 296. Cited Mitf. Tr. 261. *Wyatt's* Prac. Reg. 375.

against any one of them for the whole duty shall be good; and that there are divers precedents of it. *Sed Q.* If it be not only, where the other factors are beyond sea. (1)

BARKER v. WYLD.

(1) The general rule is that where two or more are liable to a demand, you shall not proceed against one alone, *Jackson* v. *Rawlins*, post 2 vol. 195. But in the case of a joint and several bond obligee may proceed in equity, for an account against any one of the obligors named in the bond. *Collins* v. *Griffiths*, 2 P. Wms. 313, on demurrer. [But see *Angerstein* v. *Clark*, 2 Dick. 738, 3 Swan. 147. n. *Haywood* v. *Ovey*, 6 Madd. 113. *Bland* v. *Winter*, 1 S. & S. 246.] Vide *Cowslad* v. *Cely*, Pre. Ch. 83, where it seems one factor out of several joint factors suable alone in such a case, *Chancey* v. *May*, ibid. 592, where on demurrer held that part of the proprietors of an undertaking might bring others of them to account, without making all the rest parties, they suing in behalf of themselves and the rest, except the defendants. First, because all the rest were in effect before the court. 2dly. Because of inconvenience by abatements and otherwise: But where all the parties to a vestry order, were not made parties to a bill, for payment of money allowed by that order, the court would not make a decree, *Henchman* v. *Ayer* and *Others*, Hard. 333. Note it does not appear whether on demurrer or otherwise. [See further on Suits by and against some of a numerous body of parties, *Adair* v. *New River Company*, 11 Ves. 429. *Good* v. *Blewitt*, 13 Ves. 397. *Cockburn* v. *Thompson*, 16 Ves. 321. *Meux* v. *Maltby*, 2 Swan. 277. *Attorney-Gen.* v. *Heelis*, 2 S. & S. 67. *Gray* v. *Chaplin*, ib. 267.]

THORNE *versus* THORNE.

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Case 133.

23 *February.* *In Court.* *Lord Keeper.*

A feoffment without livery to trustees to stand seized to the use of a brother amounts to a covenant to stand seized.

1 Vent. 137. 2 Lev. 9. 1 Mod. 175. 2 Keb. 754, 784.

A MAN had by indenture mentioned to grant enfeoff and confirm his land unto trustees to stand seized to the use of his three brothers in consideration of blood, natural love and affection; but it happened this deed was never executed with livery. The question was, whether it should work as a covenant to stand seized: and it was decreed by the *Lord Keeper* without any difficulty. (1) The like judgment was cited in the case of *Crossing* and *Scudamore*, and in the present case, though it was not taken notice of, there was an express covenant, that the *cestui que* trust should enjoy according to, and for, and during the estates thereby respectively limited.

(1) Reg. Lib. 1682. B. fol. 411. So *Doe on demise of Melbourne & Ux.* purchasers under a commission, against *Simpson*, a bankrupt, 2 Wils. Rep. 22. So in case of a release the lease for year lost, and consideration proved, *Brown* v. *Jones*, 1 Atk. 188. So in the case of a void grant, *Roe*, *on dem. of Wilkinson* v. *Tranmer*, 2 Wils. 75. Et vide *Thompson* v. *Attfield*, ante p. 40, and cases cited in not. there.

Settlement with power of revocation. Subsequent mortgage a revocation *pro tanto* only. *Vid. ante Case* 84.

In this case the settlement was with power of revocation, and subsequent to the deed the grantor had made a mortgage in fee to the defendant, who was one of the brothers. The court held this to be a revocation *pro tanto* only.

Case 134.

BATTY *versus* LLOYD. (1)

Eodem die. In Court.

Eq. Ca. Ab. 275. (I.) pl. 2. S. C.

One entitled to an estate after the death of two old lives, takes 350*l.* to pay 700*l.* when the lives fall, and mortgages the estate as a security.

THE defendant had agreed with the plaintiff, who was to have an estate fall to her after the death of two old women, to give her 350*l.* in consideration of being paid 700*l.* at the death of the two women, and the plaintiff was to secure this 700*l.* on a mortgage of her reversionary estate.

No relief against this bargain, tho' both the lives died within two years. *Vid. post Case* 161.

It happened that both the women died within two years afterwards. And now the bill was to be relieved against this bargain. *Sed non allocatur;* though the case of *Nott* and *Hill* (2) was cited, where relief was given in such a case as this: the plaintiff in that case being prevailed upon through his necessities. (3)

[142] *Lord Keeper.* I do not see any thing ill in this bargain. I think the price was the full value, though it happened to prove well. Suppose these women had lived twenty years afterwards, could *Lloyd* have been relieved by any bill here? I do not believe you can shew me any such precedent.

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(1) Cited by *Solicitor-General*, arg. as never having been contradicted, *Chesterfield* v. *Janssen*, 1 Atk. 335. Cited also by Sir *Thomas Sewell*, in Lord *Brownlow* v. *Vernon*, 26th Feb. 1778.

(2) Post 167, 271.

(3) In what cases equity will relieve against hard or unequal contracts, and where not actual fraud, vide *Osmond* v. *Fitzroy*, 3 P. Wms. 129, and cases in not. there. But equity will not relieve even from hard and unconscionable bargains, if entered into by parties with their eyes open, *Willis* v. *Jernegan*, 2 Atk. 251. *Lewis* v. *Pead*, 1 Ves. jun. 19. So bill dismissed where price inadequate, but no fraud, *Nicoll* v. *Gould*, 2 Vez. 422; and where the ground of the bill was inadequacy of price, and no fraud, and filed twelve years after the sale dismissed with costs, *Moth* v. *Atwood*, 5 Ves. 845, but decided on strong and particular circumstances. But the case of an heir of a family dealing for an expectancy in that family is to be distinguished from ordinary cases, *Gwynne* v. *Heaton*, 1 Br. Ch. Rep. 10. Et vide *Barney* v. *Tyson*, 2 Vent. 359. *Twiselton* v. *Griffith*, 1 P. Wms. 310, and cases cited in note there. *Bacon's* Tracts, 278-9. And for further learning on inadequacy of price, and the principle upon which sales of reversions by young heirs, &c. are set aside in equity, vide *Coles* v. *Trecothick*, 9 Ves. 246. [*Underhill* v. *Horwood*, 10 Ves. 219. *Western* v. *Russell*, 3 V. & B. 187. *Copis* v. *Middleton*, 2 Madd. 430.]

What is mentioned of the plaintiff's necessities, is, as in all other cases. One that is necessitous must sell cheaper than those who are not. If I had a mind to buy of a rich man a piece of ground that lay near mine, for my convenience, he would ask me almost twice the value: so where people are constrained to sell, they must not look to have the fullest price: as in some cases that I have known, where a young lady that has had 10,000*l.* portion payable after the death of an old man or the like, and she in the mean time becomes marriageable, this portion has been sold for 6000*l.* present money, and thought a good bargain too. It's the common case; pay me double interest during my life, and you shall have the principal after my decease.

NORDEN *versus* NORDEN.

Case 135.

Eodem die. In Court.

Eq. Ca. Ab. 138, pl. 2. S. C.

A. obtains a decree for 2,700*l.* against *B.* who appeals to the *House of Lords*, where the decree is affirmed, and *B.* on petition obtains an order for a re-hearing, and immediately falling ill, makes his will, and devises his lands for payment of his debts.

Decreed that after all the other debts were satisfied, *A.* should be paid his debt.

ONE *Hollis*, that had a demand of 500*l.* against *Norden*, and had run it up to 2700*l.* obtained a decree for it in this court. *Norden* appealed to the *House of Lords*, where the decree was affirmed. It was observed that *Norden* at the pronouncing of this decree in the *House of Lords* fell down in a swoon, and within a week afterwards died, as supposed of grief: but he first got a petition answered for a re-hearing; and in his sickness devised all his lands for payment of his debts: and now *Hollis* would come within this trust to have satisfaction of his debt.

Lord Keeper. It cannot be supposed that a man who denied your debt upon his oath, and died your martyr in his cause, should ever intend you should have the benefit of this trust. Suppose a verdict had passed against a man, and he should bring an attaint, and pending this suit he should make such a settlement for payment of his debts: would any man say, that he ever intended the debt recovered by the verdict should be satisfied out of it? However at length he decreed, that after all debts upon simple contract were paid, *Hollis* should come in and be paid his debt, if he could find assets. (1)

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(1) *Quære.* If *Hollis* was not by the terms of this decree admitted within the trust? And if so, whether his debt ought not to have been preferred? Vide Lord *Hollis* v. Lady *Carr*, post 431.

Case 136.

LORD PAGET *versus* READ.

1 *Martii.*
In Court.
Lord Keeper.
Eq. Ca. Ab. 61, pl. 2. S. C.
Husband, though parted from his wife, charged in equity with his wife's wasting of goods, which were devised to her for her life only.

SEVERAL goods were devised to Mr. *Read's* wife for life, and after her decease to the Lord *Paget*. In this case, although Mr. *Read* and his wife were parted, and there had been great suits for alimony, and she during the separation had wasted these goods: yet the *Lord Keeper* thought it reasonable that the husband should be charged for this conversion of the feme; the Lord *Paget's* title being paramount the feme, and not under her. (1)

(1) A trial at law was directed as to the goods, and the value thereof come to the hands of the defendant's wife; but the suit was afterwards compromised. Reg. Lib. 1682. A. fol. 698.

Case 137.

HARDING *versus* EDGE.

Eodem die.
In Court.
Eq. Ca. Ab. 144, pl. 22.
2 Ch. Ca. 94. S. C.
Debt by a decree shall be paid after judgments, and before debts by bond.

UPON a special report the sole question was, how a duty decreed should take place in relation to other debts in point of priority of satisfaction; and ordered, that a decree should precede debts on simple contract and bonds, and take place next to judgments. And the case of *Parker* and ——— was cited, (1) where it had been so resolved: and as to the objection, that in debt upon a bond at law an executor could not defend himself by pleading he had no assets, *ultra* what would amount to satisfy the decree; it was answered, he might defend himself by a bill in this court, which would take care to protect him therein. (2)

(1) Probably *Parker* v. *Dee*, 2 Ch. Cas. 200-1. Cited in *Solley* v. *Gower*, post 2 vol. 62.

(2) The words of the decree are, "His Lordship declaring that debts "by decree are in nature of judg- "ments at law, and ought to be paid "before debts by bond or simple "contract." Reg. Lib. 1682. A. fol. 369. Vide *Robinson* v. *Tonge*, 3 P. Wms. 401. Note (F). *Morrice* v. *Bank of England*, Forr. 218. Affirmed on appeal, 4 Bro. Par. Cas. 287. Vin. Ab. vol. 19, p. 326. Ca. 6. *Surrey* v. *Smalley*, post p. 457. *Searle* v. *Lane*, post 2 vol. 37. ibid. 88. *Darston* v. Earl of *Orford*, Pre. Ch. 188. and mentioned in *Morrice* v. *Bank of England*, Forr. 223. Not. (F) *Smith* v. *Haskins*, 2 Atk. 385. *Bishop* v. *Godfrey*, Pre. Ch. 179. From these cases the doctrine appears to be fully esta-

blished that in equity a decree of the Court of Chancery is equal to a judgment at law, and is to be paid with judgments as they stand in priority of time. Vide also the decree in *Morrice* v. *Bank of England*, 1736. Lib. B. fol. 13. As to what extent it is in all cases so, vide *Burdett* v. *Rockley*, ante 58. and cases cited in not. there. And as to distinction taken between final decree, and decree *quod computet*, vide *Morrice* v. *Bank of England*. *Smith* v. *Haskins*, ub. sup. And for the present state of the law on this latter head, vide the cases cited in not. in *Smith* v. *Haskins*, 2 Atk. 387. [See further on the effect of decrees in the administration of assets, *Douglas* v. *Clay*, 1 Dick. 393. *Kenyon* v. *Worthington*, 2 Dick. 668. *Paxton* v. *Douglas*, 8 Ves. 520. *Perry* v. *Philips*, 10 Ves. 34. *Gilpin* v. *Southampton*, 18 Ves. 469. *Terrewest* v. *Featherby*, 2 Mer. 480. *Sims* v. *Ridge*, 3 Mer. 464. *Jackson* v. *Leaf*, 1 J. & W. 229. *Fleming* v. *Prior*, 5 Madd. 423. *Largan* v. *Bowen*, 1 Sch. & L. 299. *Farrell* v. *Smith*, 2 Ba. & Be. 342.]

PALMER *versus* JONES.

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Case 138.
Eodem die.
In Court.
Lord Keeper.
Eq.Ca.Ab. 397, pl. 2. S. P.

Trustee not to be charged with imaginary values, but only as a bailiff.

This cause coming to be reheard, the *Lord Keeper* thought the former decree too severe upon Doctor *Jones*, the trustee; and declared he would never charge a trustee with imaginary values; but that he should be charged as a bailiff only. He thought it a great hardship, that a trustee was allowed nothing for his own labour and pains. It was answered, that it had often been complained of in court as too hard a rule to charge a trustee with what he had made, or might have made, without his wilful default; but the court could never yet find where else to fix a measure.

The *Lord Keeper* said, that very supine negligence might indeed in some cases charge a trustee with more than he had received, (as he remembered in the case of *Hollis* and *Montague*) but then the proof must be very strong. (1)

For the plaintiff it was urged, that this case had one unusual circumstance, for here the trustee had expressly cove-

(1) Trustees are mere stake-holders, and cannot be affected with more than they have actually recovered without wilful default, *Pybus* v. *Smith*, 1 Ves. jun. 193. 3 Br. Ch. Rep. 340. Trustee decreed to pay interest for money of *cestui que trust*, kept in banker's hands, *Young* v. *Coombe*, 4 Ves. 101. Vide in bankruptcy of *Hilliard*, 1 Ves. jun. 90: *Pocock* v. *Reddington*, 5 Ves. 794. [and see *Massey* v. *Banner*, 1 J. & W. 241. and cases there cited.] So trustees charged with loss occasioned by negligence in not receiving money and costs, although allowed no corrupt motives on part of trustees, *Coffrey* v. *Darby*, 6 Ves. 497. Vide Fonbl. Tr. Equity, Book. 2. sect. 4, 5, 6, 7. and cases there cited. *Ratcliffe* v. *Graves* and *Al.* post 196. [*Tebbs* v. *Carpenter*, 1 Madd. 290. and cases there cited.]

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nanted to set and let the land, and upon other terms would not have been admitted into the trust; yet for eight years together he had kept the land in his own hands, &c.

After debate the plaintiff was glad to remit good part of what he had by the former decree. And so the matter ended by compromise.

Case 139.

BOVEY *versus* SMITH.

2 *Martii.*
In Court.
Lord Keeper.
Eq. Ca. Ab. 256, pl. 5.
2 Ch. Ca. 124. S. C.
Vid. ante Case 58 & 74.

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THE case was, Mrs. *Bovey* the plaintiff's mother living in *Holland*, and though a feme covert, yet traded as a feme sole; and having acquired to herself a separate estate, about *forty* years since made her will in *Dutch*, and thereby devised her houses in *Chelsea*, which she had purchased *with her capital*, to *William Bovey*, her husband's son by a former venter, and two other trustees and their heirs, in trust *for her four daughters and their children, and such of their children as should be alive at the last;* and afterwards by her said will declares the trust of all her estate thereby undisposed of to be for her and her heirs. The plaintiff claims as heir to his mother, his elder brother not being of the whole blood; but by a former venter.

Before the making of this will Mrs. *Bovey* had settled these houses by deed executed in her lifetime on the same trustees, in trust for such persons and such estate, as she by any writing under her hand and seal should direct and appoint.

William Bovey and the other trustees apprehending that this devise carried the inheritance of these houses to the daughters, in 1652 sell the inheritance thereof for a full and valuable consideration: and the money is proportionably distributed amongst the daughters, the plaintiff being privy to the conveyance, and making no claim, or pretending any right to these houses, and a *fine* is levied of them, and *five* years pass. Afterwards differences arising betwixt the plaintiff and *William Bovey* the trustee, there is an award made, and 200*l.* awarded to be paid the plaintiff, and the plaintiff to give a general release of all actions real and personal; but no notice is taken in the award of the breach of trust. The 200*l.* is paid the plaintiff, and a general release given accordingly.

About ten years afterwards, *William Bovey* the trustee for a full consideration purchases back these houses to himself and his heirs; and the defendant *Smith* standing in the place of *Bovey* the trustee, and the plaintiff having now taken advice upon this will, and conceiving the daughters took only an estate for life, exhibits his bill to have an execution of this trust, and these lands decreed to him. [146]

The late *Lord Chancellor* had twice heard this cause, and decreed it both times for the plaintiff: but the decree not being signed and enrolled, the cause came this day to be reheard before the *Lord Keeper*.

For the defendant it was insisted, that this was not only a very old and stale demand, (the pretended breach of trust having been committed above thirty years since) but a very hard demand in equity, to charge a trustee, who according to the best of his skill had in this case acted honestly; and to evict the land from him, who was now become a real and innocent purchaser thereof.

And *first*, as to the will itself, it was observed, that the same was made in *Dutch*, and the original was lost, and a small mistake in the translation might make a great variance in it; for if it had been *issue* instead of *children* it would have carried an estate tail; and the custom in *Holland* may be, that those words carry an inheritance there: and the will being in truth incoherent, and almost insensible in itself, if the matter had been called in question within any reasonable time, the intent of the testator might have been made out by proof, which might have given light to the doubtful and ambiguous wording of the will, and by which the intent of the testatrix might have better appeared: but here has been an acquiescence in the plaintiff for above *thirty* years: whereas had he soon laid claim to this estate, the defendant might in equity have compelled the daughters to have refunded the money received by them out of this estate.

2*dly*. It was insisted, that the fine with proclamations and non-claim for five years was a flat bar to the plaintiff in this case; and cited cases, wherein it had been resolved, that no other claim than the exhibiting a bill, and taking out a subpœna was a sufficient claim in equity; as a man at law must file an original, where he cannot enter. [147]

3*dly*. That the release being general of all actions real and personal, it released the breach of trust, if any were; and it being full within the words of the release, after so many

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years it ought not now to be enquired into, whether this breach of trust was intended to have been released thereby.

4thly. If there was any notice of the trust in this case, it was at most but a notional notice; for both the plaintiff and the trustee apprehended, that this will carried the inheritance to the daughters.

5thly. It was observed, that this was a declaration of a trust only, and not the limitation of an estate; and that therefore there was a greater latitude left to the court in judging upon this case; and that in many respects it ought to have an equitable and favourable construction.

For the plaintiff it was answered, that though the will was in *Dutch*, and though it might be such as by the law of the *Low Countries* would carry an inheritance; (though what the custom of the *Low Countries* is, does not appear) yet that is nothing to the purpose; for a will to pass the inheritance of lands in *England*, wheresoever it is made, must be such, as will carry an inheritance according to the laws of this realm; as has been resolved in case of *Latin* wills, and the like. And the devise being concerning lands, the whole will must be in writing, and the intent of the testator cannot be supplied by proof. (1) And as to the plaintiff's acquiescence under this breach of trust, it is easily answered; for the last of the daughters died not above two
[148] years before the bill exhibited; and though the remainderman may, if he will, take advantage of the forfeiture of the tenant for life presently; yet he is not bound to do it; but shall have five years after the death of the tenant for life to make his entry or claim. And the plaintiff's bill in this case is very proper to have the land itself decreed, for though the plaintiff may have satisfaction in damages, yet the land being now come to the trustee again, the best and equalest measure is to decree him to convey the land itself: and they cited the Lord *Canmore's* case, where a trust was broken, and then a full bar to the *cestui que* trust, and yet the land coming afterwards into the trustee's hands, he was decreed to convey the land itself, as the best measure that could be taken in that case. And the plaintiff's counsel did insist, that there was not any bar at all to the trust, as this case was: for *first*, as to the release, a release shall never bar a man, who is ignorant of the right and interest he is to re-

(1) *Bertie* v. *Falkland*, Cro. Jac. 145. *Fry* v. *Porter*, 1 Mod. 300. Salk. 232. As to will of personal estate, *Fane* v. *Fane*, ante 31.

lease, and where such right is suppressed and concealed from him: and in this case the plaintiff was not apprised, that anything passed to him by this will.

2*dly*. Though the release be general of all actions real and personal, yet it was made in pursuance of an award, which concerned matters in account between the *cestui que* trust and the trustee only: and it is not, nor can be pretended in this case, that the plaintiff hath received any satisfaction for his interest in these houses.

3*dly*. All the three trustees joined in the conveyance, and so were all guilty of a breach of trust; and yet this release is made to one of them only; whereas if it had been designed to have released the breach of trust, it would have been made to them all.

Then as to the fine, it is true a fine will bar an equitable right, as well as an estate at law; but then the estate must be displaced, which here it is not; the fine being by and between the parties to the trust only, who having notice of [149] the trust, the fine operates so as to strengthen the trust, and not to extinguish it; the trust being all along incumbent on the land, and passing with it: and so this case is in truth stronger than that case of the Lord *Canmore*, for here was never any real bar: and in this case it was impossible any one should come at the land, but they must have notice of the trust; for they purchase under the will, and all their title is by the will, by which the trust is created: and a man that has notice of the will must at his peril take notice of the operation and construction of the law upon it; and though this be called a notional notice, yet it is such a notice, as has always been allowed to be good; for every man is presumed to be conusant of the law of the realm, and he shall not take advantage of his own ignorance, but *caveat emptor*.

For the defendant it was only replied, that here was no answer given, as to the plaintiff's acquiescence, and coming so late; for there was no survivorship in the case; for the jointure was severed by the fine, and all but one of the four daughters dead almost ten years before the bill.

The *Lord Keeper* in the debate put this case to *Serjeant Maynard*. *A*. seized in fee in trust for *B*. for full consideration conveys to *C*. the purchaser having notice of the trust; and afterwards *C*. to strengthen his own estate, levies a fine. Whether *B*. the *cestui que* trust be not in that

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case bound to enter within *five* years? and the counsel were all of opinion that he was not: for here *C.* having purchased with notice, notwithstanding any consideration paid by him, is but a trustee for *B.* and so the estate not being displaced, the fine cannot bar. (1)

Lord Keeper. In this case you come here in equity, after one and thirty years possession to affect an estate with a trust, notwithstanding a release and fine, and that upon a [150] supposal that Mrs. *Bovey* made no other appointment (as she had power to do by the deed and after so long a possession it ought rather to be presumed she did:) and also upon a supposal, that this is a true copy of the will. This is only a translation, and the original lost, and the difference in point of translation betwixt children and issue is nice, and the question is, who shall suffer; for the defendant is a purchaser and has paid a full consideration, and here must be affected with a notional notice only; and the plaintiff all the while stood by, and was silent, and at best was passive in the breach of trust: and this case is rather stronger than Sir *George Norton's* case, where the heir stands by, and encourages a purchaser, and afterwards trumps up a deed of entail. Though it be hard to dismiss the bill after two decrees for the plaintiff, yet I am not satisfied I can decree it for him.

Ante, Case 128.

The bill must stand dismissed. (2)

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(1) *Drapers Company* v. *Yardley*, post 2 vol. 662.

(2) Reg. Lib. 1682. A. fol. 273.

Note this decree was reversed in the *House of Lords*, 4th March, 1692, Jour. Ho. of Lor. 15th vol. 275-6.

Case 140.

ROBERTS & Al' *versus* MATTHEWS & Al'.

Eodem die.

In Court. Lord Keeper.

Scrivener puts out money on bond, and receives the interest from time to time, and then receives part of the principal, the bond remaining in the obligee's custody. No good payment.

THE case was, the defendant *Matthews* employed one *Smith* a scrivener to place out 50*l.* for him at interest, which the scrivener did to the plaintiff, and took the plaintiff's bond for it in the defendant's name; and about three months afterwards delivered the bond to the defendant. Plaintiff *Roberts* all along paid his interest to the scrivener, and about five years after the entering into this bond the scrivener

calling upon him for the principal, he paid 30*l.* (1) of it, and the scrivener not having the bond in his custody, gave the plaintiff a receipt for 30*l.* received in part for the use of the defendant *Matthews*.

Adjudged this was a void payment; for the bond being in the custody of the defendant *Matthews*, and not in the scrivener's, the plaintiff ought to have seen his money indorsed on the bond: and though this alone were enough to make it an ill payment, yet this case was the stronger; for that the plaintiff was not ignorant whose money it was; the receipt he took for the payment of the 30*l.* being for the use of the defendant. And many precedents were cited to the same purpose. (2)

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(1) It was sworn by the defendants' answer that the interest of the money lent was constantly answered to him for several years after the time stated in the bill for the payment of the 30*l.* to *Smith*, and indorsed by him, the defendant, on the bond, and that he was not privy to the payment, nor had authorised *Smith* to receive the 30*l.* R. L.

(2) This was decreed on a re-hearing before *Lord Keeper*, together with costs at law, and in this court, "The "defendant having sworn the bond to "be in his custody at the time of pay- "ment of the 30*l.* it lay on the plain- "tiff to prove the same to be in "*Smith's* hands, or otherwise that he "had authority to receive the 30*l.* "which had not been done." Reg. Lib. 1682. B. fol. 685. Trin. Term. It is the rule of the court that if the scrivener have the custody of the security, payment of the interest is good; if he deliver it up, being a bond, payment of the principal is good; but where payment of the principal in case of a mortgage deed the giving up the deed is not sufficient to restore the estate, there must be a re-conveyance. So payment of interest good if mortgagee consents, or after his death his executor either expressly or by implication, as if he accept the money afterwards of the scrivener, though the scrivener have not possession either of deed or bond, *Whitlock* v. *Waltham*, 1 Salk. 157. So *Martin* v. *Kingsley*, Pre. Chan. 209. Sir *John Woolstenholme* v. *Davis*, 2 Freem. 289. But payment though to one who usually receives obligee's money, yet who has not the bond does not discharge the obligor, *Gerrard* v. *Baker*, cited in *Henn* v. *Conisby*, 1 Ch. Ca. 94. Et vide *Henn* v. *Conisby*, ibid. p. 93. 1 Eq. Ca. Ab. 145. *Degg* v. *Osbaston*, ibid. 111, both which were cases of mortgage, and the mortgagees decreed to take the principal without interest, and a year given for the payment. *Duchess of Clevcland* v. *Executors of Dashwood*, 2 Freem. Rep. 249, where *Lord Keeper* and *Master of the Rolls* differed in opinion on the distinction (in equity) between the delivering up the deed and bond on payment of the money above-mentioned, but the case not decided on that point. If obligor compound with scrivener for less than is due it is an evidence of fraud, and then it may be the obligor may pay the money again, *Penh* v. *Browne*, ibid. 214. pl. 287. Et vide Vin. Ab. vol. 16. p. 271. Tit. payt. (c). So where bond given to trustees of feme covert, the feme keeps the bond, and payment made to one of the trustees, and receipt taken, and no notice to *cestui que trust*, not a good payment, *Baldwin* v. *Billingsley*, post 2 vol. 539. Nor to the obligee after notice of assignment of the bond, *sic. dict.* ibid. So an agreement made by scrivener to compound debt due to his principal, shall not discharge

the debtor as to the principal, though the scrivener shall indemnify the debtor, *Parrot* v. *Wells*, post 2 vol. 127. *Sed quære*, where bond and judgment, and on money paid, bond alone delivered up to debtor, *Stafford* v. *Southwick*, post 2 vol. 265. Et vide *Pritchard* v. *Langher*, post 2 vol. 197.

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Case 141.

HOLLIS *versus* WHITEING.

Eodem die. In Court. Lord Keeper.

Bill for an execution of a parol agreement for a lease of a house to plaintiff, who in confidence of the agreement had laid out money.

THE bill was to have the execution of a parol agreement for a lease of a house, setting forth that in confidence of this agreement the plaintiff had laid out and expended very considerable sums of money, &c.

Defendant pleaded the statute of frauds, &c. Plea allowed. *Vid. post Case* 148.

The defendant pleaded the statute of *Frauds* and *Perjuries*, and the plea was allowed. (1) But the *Lord Keeper* was of opinion, that if the plaintiff had laid in his bill, that it was part of the agreement, that the agreement should be put into writing, it would alter the case, and possibly require an answer. (2)

If it had been laid to be part of the agreement, that the agreement should be put into writing, whether defendant must not have answered.

(1) And the defendant may insist on the benefit of the statute with effect, by his answer, although he admit thereby the parol agreement, as charged by the bill. And there can be no enquiry about the part performance as against the defendant, the statute protects him, if he does not say any thing about the statute he must be taken to renounce it, *Cooth* v. *Jackson*, 6 Ves. 37, 39. By Lord *Eldon*, Chan. *Note*,—In the last-mentioned case there is stated to have been a part performance, the statute of Frauds was pleaded, and then an answer admitting the parol agreement, and the plea was ordered to stand till the hearing. Vide *Whitchurch* v. *Bevis*, 2 Bro. Ch. Rep. 558. Et vide *Dean* v. *Izard*, post 159, and cases cited in note there. [*Blagden* v. *Bradbear*, 12 Ves. 466. *Rowe* v. *Teed*, 15 Ves. 375. *Spurrier* v. *Fitzgerald*, 6 Ves. 548.]

(2). *Note*.—That in the case of *Dean* v. *Izard*, post 159, it is observed by the court that the statute of Frauds, though it makes void the estate, does not seem to make void the agreement, so that possibly a man may recover damages at law for the breach of it.

DE

TERMINO PASCHÆ,

35 *Car. II.* 1683.

IN CURIA CANCELLARIÆ.

ALDERMAN BACKWELL'S CASE.

Case 142.

16 *Aprilis.*
In Court.
Lord Keeper.
Eq. Ca. Ab. 52, pl. 1, 2.
2 Ch. Ca. 143.
190. S. C.

Granting a commission of bankruptcy is not discretionary but *de jure.*

SEVERAL of the creditors of *Alderman Backwell* having this vacation petitioned for a Commission of Bankruptcy against him the *Lord Keeper* ordered that a commission should issue, unless cause were this day shewn to the contrary. And it was now moved that the granting of the commission might for some time be suspended, for that much the major part of the *Alderman's* creditors had compounded with him, which would be all set aside and avoided, if a commission should go; and it was sought for only by some few and unreasonable people; the *Alderman* having already made very fair proposals, *viz.* that the creditors should be paid their whole debts, one *fifth* in ready money, and the other four *fifths* in assignments on the *Exchequer;* and that near two hundred and fifty of his creditors had accepted of this composition, and actually received their moneys, which now would be all over-reached by this commission: and they did not doubt, but in a month's time, if the commission might be so long suspended, they should agree with the rest of the creditors.

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But by the counsel for the *creditors* it was answered, that by the *Alderman's* petitioning for time and other studied delays, and by reason of privilege coming in, he had already for near seven years prevented the creditors of the benefit of this commission already; and that their danger was very great in these delays; for by the statute a purchaser was not to be over-reached unless the commission was sued out within five years after his purchase, and they did not know but that this might be a critical time for the granting of the commission in that respect: and by the very words of the

BACKWELL'S CASE.

statute no commission of bankruptcy can issue after a man's death; and though it was granted in a man's life-time, yet if nothing was done upon it before he dies, all is avoided.

Lord Keeper declared, that though the words in the Act of Parliament were, that the *Chancellor* may grant a Commission of Bankrupt, yet that (*may*) was in effect (*must*), and it had been so resolved by all the Judges. (1) And the granting of a commission was not a matter discretionary in him, but that he was bound to do it: and that he had done the *Alderman* already what kindness he could, in that he refused to grant a private seal for the passing of this commission; but that now he could deny it no longer, by reason of the prejudice and hazard that the creditors might in this case sustain by delays. And as for what was said, that much the greater part of the creditors had already submitted to a composition, and had delivered up their specialties, and now this commission would over-reach them, and they would be in danger to lose their debts; he said, he could not help that, if it should so fall out: but as for bills of conformity they had been long since exploded, and there was no such equity now in this court: but he would take care, that there should be able persons nominated Commissioners; and therefore first, to prevent all danger, he directed the commission should be this day sealed, and that the Commissioners should meet, and proceed to prove the *Alderman* a bankrupt, so that the execu-
[154] tion of the commission might not be prevented by his death; and that then they should surcease all further prosecution: (2) and directed Alderman *Backwell's* counsel to bring him the names of such sufficient and honest persons, as might be fit to be Commissioners in this case, and such as might treat with the creditors, and see if they could come to any agreement; and he would renew the commission to such

(1) Wherever a statute directs the doing of a thing for the sake of justice or the public good, the word (*may*) is the same as (*shall*). Thus 23 Hen. VI. says the sheriff may take bail; this is construed he *shall*; for he is compellable so to do, *Rex* v. *Barlow*, Carth. 293. Salk. 609. *Rex* v. *Inhabitants of Derby*, Skin. 370. So the words, "*shall and may*," in general acts of parliament or in private constitutions, are to be construed imperatively, *Attorney-General* v. *Lock*, 3 Atk. 166, but the construction of those words in a deed depends on circumstances, *Stamper* v. *Miller*, 3 Atk. 282.

(2) The editor has not been able to find any entry of this case in the Register's Book; but in the Afternoon Minute-book, 1682, 16th April, there is the following entry, "*Cur.* The "commission to go, and the commissioners therein named to meet, to "save the benefit of the act, but not "to act further, or to make any assignment of the estate, or to do any "thing else till further order."

persons: and said, it was a mischief, that the Act of Parliament had subjected the Commissioners to an action, (1) so that no sufficient persons, and such as might be fit to manage such a concern as this, would undertake the trouble of it. And as for a debt of 60,000*l.* that Mr. *Attorney* said the *Alderman* owed the *King*, the *Lord Keeper* said, if such a debt was owing, it was fit application should be made to the *Lords* of the *Treasury*, that his *Majesty* should be satisfied out of the assignments of the *Exchequer* debt; but said, there was a patent now lay before him, which he was much importuned to pass, whereby this debt of the *King's* was to be fixed upon the land, and the *King* to grant this to the *Alderman's* son.

BACKWELL'S CASE.

Vid. post Case 205.

(1) That the commissioners of bankrupts are liable to action of false imprisonment, vide *Miller* v. *Seare*, 2 Blackst. 1141. where the subject of persons acting in a judicial capacity being liable to such action is a good deal discussed. [Over-ruled in *Doswell* v. *Impey*, 1 B. & C. 163. which see, and the cases there cited.]

GIBBS *versus* COTTON.

Case 143.

Eodem die.

In Court.

Lord Keeper.

UPON a motion for a messenger upon a *cepi corpus* returned in *London*: the *Lord Keeper* said, that now the granting of a messenger in such a case was become the ordinary process of the court, and it might be necessary for expedition: but he must take care that the King might not lose his amercements, and therefore for the future no messenger should go till the sheriff was amerced: but it was answered, that would occasion great delay, for that the sheriff could not be amerced, but in term time. (1)

Vid. ante Case 102.

(1) When a *cepi corpus* is once returned, there is an end of all manner of process, and regularly in such a case you ought to move that the defendant may enter his appearance, and be examined within four days, or stand committed, *Frederick* v. *David*, post 344. Et vide *Anon.* 2 P. Wms. 301. *Miles* v. *Lingham*, 7 Ves. 230. [*Holme* v. *Cardwell*, 3 Madd. 114.]

Case 144.

Ex parte SIR BENJAMIN WRIGHT.

Eodem die.
In Court.
Lord Keeper.

Motion, that a lunatic, who had recovered his understanding, might be inspected and make a settlement of his estate.

A MOTION was made that a man, who was found to be a lunatic, being now by his confinement become of sound mind, might be inspected, and might make a settlement of his estate. But the *Lord Keeper* refused to make any order in it; but directed them, that if he made any settlement of his estate, the same should be done before the *Justices of the Common Pleas* by fine, that so they might examine him, and inspect him. And directed, that for as much as now he was found a lunatic on record, they should reply to it, that he was now restrored to his understanding; that so issue might be taken upon it and tried in the *Common Pleas.* (1)

(1) And then the court would give further directions. Afternoon Minute-book, 1682. 16 *April.* Vide *Clerk* v. *Clerk*, post 2 vol. 412.

Case 145.

The Case of the Town of NOTTINGHAM.

27 Aprilis.
In Court.
Lord Keeper.

Scire facias to repeal a new charter, after surrender of the old one, returned by the old sheriffs. If it shall be received.

THE Corporation being divided into parties, one party surrendered the old charter, and took a new one; the other party would stand and fall by their old charter, and brought a *scire fac.* to repeal this new charter, upon which the old sheriffs returned *scire feci*, and the return was filed.

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And now it was moved by Mr. *Attorney-General*, that this return might not be received, for that were to admit that the old charter was in being, contrary to the surrender and new charter, which were both remaining on record in this court.

But it was answered, that the objection of prejudice was equal on both sides: but with this, that it was impossible this return should be made by the new sheriffs, for they are defendants, and they cannot return, they had served themselves: and Mr. *Attorney* has admitted, that the old sheriffs are the sheriffs in possession, by his bringing a *quo warranto* against them: and this being purely a question of right, and the return that is to be made being only whether

they had notice or not; they cannot be injured by it: if they have not legal notice they may plead it, and it will that way avail them. And now they move too late, this return being already regularly filed in court, and to damn it now, were to determine the merits of the cause upon this motion.

CASE OF THE TOWN OF NOTTINGHAM.

The *Lord Keeper* was of opinion, that the court in such a case as this ought not to interpose; but gave Mr. *Attorney-General* a fortnight's time to speak to it; but said, whereas the King has a *quo warranto* depending against them, (1) if the parties, who were against the new charter, meant to out-run the King's action, he thought that ought not to be suffered; and it was a strange proceeding and without precedent, that was used in the Duke of *Buckingham's* case, *viz.* pending the King's suit to convict his witnesses of conspiracy.

(1) For the past and present state of the law, as to *quo warranto* against corporations, vide 2 Inst. 282. stat. 2 William and Mary, cap. 8. sess. 1. by which, amongst other things, it is enacted, that the franchises of the city of *London*, shall never more be forfeited for any cause whatsoever, stat. 11 Geo. I. cap. 4. by which it is provided, that no corporation shall be dissolved for any default to choose a mayor, &c. but a mandamus shall issue from K. B. Vide also stat. 12 Geo. III. cap. 21. Kyd's Law of Corporations. [And see Selwyn's Ni. Pri. tit. *quo warranto*.]

The LADY POINES's Case.

Case 146.

Eodem die.

In Court.

THE Lady *Poines's* trustee having contracted to sell her estate to one person, and she herself having actually sold it to another, this trustee disturbed the purchaser in his possession; and it was now moved for an injunction to quiet the possession of the purchaser. But it was answered, that such a motion never was made to have an injunction to quiet the possession for a defendant, who had no bill in court, and that before the cause was heard. An injunction for quieting the possession is only grantable where the plaintiff has been in possession for the space of *three* years before the bill exhibited, upon a title yet undetermined, or in case the cause hath been heard, and judgment passed upon the merits of

Eq. Ca. Ab. 284, pl. 1.

No injunction to quiet possession, but where the party has been in possession *three* years before filing his bill, or where the cause has been heard, and the merits determined.

Lady Poines's Case.

the cause by the court. And therefore the *Lord Keeper* denied the motion. (1)

(1) Vide Harr. Ch. Prac. 2 vol. 186. and cases cited there. The 21st article of the charge against *Cardinal Wolsey* is, "That the said Lord *Cardinal* hath granted many injunctions "by writ, and the parties never called "thereunto, nor bill put in against "them." Vide 4 Inst. p. 92.

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BROWN *versus* BROWN.

Case 147.

30 *Aprilis.*

In Court. Lord Keeper.

Eq. Ca. Ab. 50, pl. 4. 225, pl. 10. 2 Ch. Ca. 140. 3 Ch. Rep. 76. S.C.

Award made in pursuance of a rule of court, at a trial in an action of waste against tenant for life for not repairing, and 380*l.* awarded, and though the party had made good the repairs within 40*s.* before the award made, yet no relief.

Sir *Anthony Brown* being tenant for life, remainder to his first and other sons in tail, remainder in tail to the defendant of some mills and houses of about 70*l.* *per ann.* and having no issue, suffered the mills and houses to go greatly out of repair; and it was computed that the reparations would amount unto 380*l.* or thereabouts; hereupon *Brown*, the remainder-man, brings an action of waste at law. When the cause came to be tried at the *assizes*, there was a proposition made for a reference to arbitrators and umpire, and accepted by the parties, and by consent it was made a rule of court. Afterwards and before the award made, Sir *Anthony Brown* repairs all the waste within forty shillings, (1) and forbids the arbitrators to make any award, who thereupon forbore, and likewise forbid the umpire; but he, notwithstanding, made his award, that Sir *Anthony Brown* should pay the defendant 380*l.*

The plaintiff's bill was to be relieved against this award; and for the plaintiff it was insisted, that it was a bold thing of an arbitrator or umpire to make an award, after he had been forbid by the party; and they said it was a rule here, that no award should stand, where the arbitrator or umpire refused to hear the party; and they endeavoured to make it out, that the umpire had so done in this case; but their proof amounted to no more, than that the umpire had said, he was so well satisfied, as to the value of the repairs, that the plaintiff might bring what witnesses he would, he should

(1) This does not appear in the Register's Book, all that appears is a statement in the bill, "that before the "said award was made, the plaintiff "put the premises into very good and "tenantable repair, and better than "they were when the plaintiff entered." R. L.

not believe them, he having viewed the repairs himself. Then they insisted that the damages in this case were very outrageous, the repairs being made good within 40*s.* before the award made: and the umpire being a carpenter, they compared it to the butcher of *Craydon's* case, (1) who had awarded a man, that had been called a *bankrupt knave*, 300*l.* to repair his honour, as he expressed it in his award. And it was said that in this case the defendant had but a remote remainder after an estate tail, and yet he had as much damages given him, as if he were to come immediately into the estate.

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For the defendant it was insisted, that this was an award made in pursuance of a rule of court, and the whole matter had been examined in the *Common Pleas*, and when they were at the wall there, and under an attachment for not performing of the award, then they come with a bill here, and get an injunction; whereas it is not usual to stay proceedings on an attachment in another court: (2) and that here was no fraud or collusion in the making of this award, and *that* is necessary to the avoiding of it in equity. And they conceived the damages were not outrageous, for the umpire might have given the treble value. And as to the objection, that the defendant had only a remote remainder after an estate tail, it was answered by Serjeant *Maynard*, that the damages were not to be considered in proportion to the man's estate, who is to have them, but proportionable to the damage done the inheritance: and he said if awards must be set aside on such slight pretences, they had as good strike that title out of the books; and he cited the case of *Robins* and *Grantham*, where there was a plain mistake of 250*l.* and yet the party could not get any relief against the award. And the case of *Crab* and *Fenton*.

After long debate the *Lord Keeper* dismissed the bill, (3) saying, he saw no fraud or collusion in the matter, and the damages were not outrageous: he might have awarded the treble value, although it is true, as was objected by the plaintiff's counsel, 380*l.* is near the value of an estate for life of 70*l. per annum*. He said, where there appears a manifest error in the body of an award, there in some cases there may be relief against it in *Chancery;* but where the error does not appear without unravelling of it, and exami-

(1) Vide *Earl* v. *Stocker*, post 2 vol. 251.

(2) Vide —— v. *Emerton*, ante, 25.

(3) Without costs, R. L.

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nation to matters of account, he thought it was not relievable here. (1)

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Note.—In this case the umpire himself, though excepted to, was read as a witness. (2)

(1) As to the circumstances under which awards may be examined in equity, they are to be found in the following leading cases, *Cresley* v. *Carrington*, post 469. Contra post 2 vol. 79, S. C. *Hamilton* v. *Stapleton*, Colles' P. C. 209. *Ward* v. *Periam*, 2 Eq. Ca. Ab. 91, pl. 1. *Coxeter* v. *Anderson*, 2 Eq. Ca. Ab. 92, pl. 2. *Metcalf* v. *Ives*, 1 Atk. 63. *Kampshire* v. *Young*, 2 Atk. 155. *Lingood* v. *Eade*, ibid. 501. *Ridout* v. *Pain*, 3 Atk. 494. *Anon.* 3 Atk. 644. *Knox* v. *Simmonds*, 3 Bro. Ch. Rep. 358. 1 Ves. jun. 369. Lord *Lonsdale* v. *Littledale*, 2 Ves. jun. 451. And where the court will not interfere. *Coxeter* v. *Anderson*, ub. sup. *Titterson* v. *Peat*, 3 Atk. 529. *Morgan* v. *Mather*, 2 Ves. jun. 15, 22. *Hutchison* v. *Hodgson*, 2 Anstr. 361. *Cooth* v. *Jackson*, 6 Ves. 34. *Hartnell* v. *Hill*, Forr. Rep. in Exchequer, 73. *Street* v. *Rigby*, 6 Ves. 821. And where awards have been confirmed, or not set aside, *Jones* v. *Bennett*, 1 Bro. Parl. Ca. 411. *Waller* v. *King*, 9 Mod. 63. *Keen* v. *Godwin*, Bunb. 250. *Lingood* v. *Eade*, 2 Atk. 506. *Ridout* v. *Pain*, ub. sup. *Champion* v. *Wenham*, Amb. 245. *Morgan* v. *Mather*, ub. sup. *Emery* v. *Wase*, 5 Ves. 848. *Ching* v. *Ching*, 6 Ves. 282. Where set aside *Cavendish* v. ———, 1 Ch. Ca. 279, where *Lord Chancellor* said, he would never decree that an award should bind an infant. *Earle* v. *Stocker*, post 2 vol. 251. *Parker* v. *Burroughs*, Colles' Parl. Ca. 257. *Harris* v. *Mitchell*, post 2 vol. 485. *Burton* v. *Knight*, ibid. 514. *Spettigue* v. *Carpenter*, 3 P. Wms. 361. *Champion* v. *Wenham*, ub. sup. *Metcalf* v. *Ives*, 1 Atk. 63. *Lingood* v. *Eade*, 2 Atk. 506. *Ridout* v. *Pain*, 3 Atk. 494. Sed vide *Ching* v. *Ching*, 6 Ves. 282. Lord *Lonsdale* v. *Littledale*, 2 Ves. jun. 451. *Walker* v. *Frobisher*, 6 Ves. 70. As to the practice of the court in relation to exceptions to awards, vide *Cresley* v. *Carrington*, post 469, and cases cited in note there. So far as a general principle can be collected from these cases, it appears, that awards are examinable and acted upon in equity, as well as in courts of law, on the ground of fraud, (and that though submission made a rule of a court of law) partiality, want of due notice, or wilful misbehaviour in the arbitrators or parties, but not where the subject of reference is such, that the arbitrators can, and do finally adjudge thereon, and no objections made but upon the ground of hardship, or misconception as e. g. on matters of fact and points of law. Sed quære as to the latter, except when directly referred as such to the arbitrator, and the point of law is *doubtful*, vide *Ridout* v. *Pain*, 3 Atk. 494. *Ching* v. *Ching*, 6 Ves. 282. That in no case will a court of equity be ancillary to the making effectual an insufficient award, or insufficient powers in the arbitrators, and that wherever the conduct of arbitrators is sought to be impeached the court will look with a jealous and scrutinizing eye through the evidence adduced for that purpose. [See farther on the doctrine of equity on the subject of awards, *Anderson* v. *Darcey*, 18 Ves. 447. *Wood* v. *Griffith*, 1 Swan. 55. *Steff* v. *Andrews*, 2 Madd. 6. *Harrison* v. *Gardner*, 2 Madd. 198. *Campbell* v. *Twemlow*, 1 Price, 81. *Goodman* v. *Sayers*, 2 J. & W. 249. *Auriol* v. *Smith*, 1 Turner, 121.] Note the subscription to an award may be made a rule of court, after the award made. *Alardes* v. *Campbell*, 1 Barnard. Rep. K. B. 152. *Chicote* v. *Lequesne*, 2 Vez. 315. *Pownall* v. *King*, 6 Ves. 10. Et vide stat. 9 & 10 Will. 3. cap. 15. [*Fetherstone* v. *Cooper*, 9 Ves. 67. *Smith* v. *Symes*, 5 Madd. 74.]

(2) He was made a defendant, Reg. Lib. 1682. A. fol. 702. But might nevertheless be a witness, *Carey* v. *Breachfield*, Pre. Ch. 411.

HOLLIS *versus* EDWARDS, & Al'.

Case 148.
1 *Mali.*
In Court.
Lord Keeper.

DEANE *versus* IZARD.

In these cases, bills were exhibited to have an execution of parol agreements touching leases of houses, and set forth, that in confidence of these agreements the plaintiffs had expended great sums of money in and about the premises, and had laid the agreement to be, that it was agreed, the agreements should be reduced into writing. The defendants pleaded the statute of *Frauds* and *Perjuries*.

Vid. ante Case 141.

For the plaintiffs it was insisted on the saving in the act of parliament, *viz.* Unless the agreement were to be performed within the space of a year: but it was answered, *that* clause did not extend to any agreement concerning lands or tenements. Then it was insisted for the plaintiffs, that undoubtedly they had a clear equity to be restored to the consideration they had paid, and to the money which they in confidence of the agreement had expended on the premises.

As touching that matter, it was said by the *Lord Keeper*, that there was a difference to be taken, where the money was laid out for necessary repairs or lasting improvements, and where it was laid out for fancy or humour; and that he thought clearly the bill would hold so far, as to be restored to the consideration: (1) but he said, the difficulty that [160] arose upon the act of parliament in this case was, that the act makes void the estate, but does not say the agreement itself shall be void; and therefore, though the estate itself is void, yet possibly the agreement may subsist; so that a man may recover damages at law for the non-performance of it; and if so, he should not doubt to decree it in equity: and therefore directed, that the plaintiffs should declare at law upon the agreement, and the defendants were to admit it, so as to bring that point for judgment at law; and then he would consider, what was further to be done in this case. (2)

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(1) *Quære.* As to the sense of this passage, and whether the *Lord Keeper* must not be taken to mean that when the money was laid out for necessary repairs or lasting improvements, the bill would hold for that, and for the consideration, but where the money was laid out for fancy or humour that there, though the bill might hold for the consideration, it should not for the money so laid out?

(2) The defendants were to put in their answer as to the agreement and the circumstances thereof before the

9th of May. Reg. Lib. 1682. A. fol. 497. Such answer was accordingly put in and decreed, and then plaintiff was ordered to establish the agreement at law, where he afterwards became nonsuit, Reg. Lib. 1682. A. fol. 669. The bill was afterwards (17th June) dismissed without costs, but defendants to be at liberty to pursue their costs at law, as they should be advised, Reg. Lib. 1683. A. fol. 603. As to the doctrine of part performance, it is now the clear established doctrine of this court that where parol agreement and substantial part performance, though on the part of plaintiff in equity only, specific performance will be decreed, *Coleman* v. *Upcott*, 5 Vin. Ab. 527. pl. 17. *Walker* v. *Walker*, 2 Atk. 100. So where signed by one party only, *Owen* v. *Davis*, 1 Vez. 83, and cases cited in note (R) there, *Seton* v. *Slade*, 7 Ves. 265. Et vide cases cited in note, *Hawkins* v. *Holmes*, 1 P.Wms. 771. As to what shall be considered such a part performance, *Thurlow*, Lord Chancellor, says, "I do not recollect "any case where an act merely introductory or ancillary to the agreement, though attended with expence, "has been held a part performance," *Whitbread* v. *Brockhurst*, 1 Br. Ch. Rep. 412. The circumstances that are to influence the application of this principle must be so minute and various that it would be endless to state all the particular acts that have, and have not been considered as part performance of parol agreement, by the cases: the leading cases, however, on this subject are independently of *Whitbread* v. *Brockhurst*, ub. sup. As to preparing the conveyance after marriage; not considered as part performance, *Redding* v. *Wilkes*, 3 Bro. Ch. Rep. 399. So money laid out in improvement, and payment of increased rent by tenant continuing in possession, *Smith* v. *Turner*, at the Rolls, Mich. Term. 1720. *Wills* v. *Stradling*, 3 Ves. 378. Plea ordered in latter case to stand for an answer. Sed vide as to distinction between improvements of taste and lasting improvements, the principal case, and in *Lacon* v. *Mertins*, 3 Atk. 1, delivery of possession or payment of part of the money considered as part performance. So as to possession, *Butcher* v. *Stapely*, post 363, and cases cited in not. there. As to acts done by arbitrators, to whom a dispute concerning the agreement was referred, such as allotting and surveying the lands in question, not considered as part performance, *Cooth* v. *Jackson*, 6 Ves. 12. As to payment of auction duty; not considered as part performance, *Buckmaster* v. *Harrop*, 7 Ves. 341, at the Rolls. [S. C. on appeal, 13 Ves. 456.] The ground of the doctrine of part performance is fraud, ibid. Et vide *Clerk* v. *Wright*, 1 Atk. 12. The above cases, with the cases respectively referred to by them, seem to contain the material learning on this head of equity. [See also *Main* v. *Melbourn*, 4 Ves. 720. *Clinan* v. *Cooke*, 1 Sch. & L. 22. *Davis* v. *Hone*, 2 Sch. & L. 341. *Frame* v. *Dawson*, 14 Ves. 386. *Gregory* v. *Mighell*, 18 Ves. 328.]

Case 149.

LADY DACRES *versus* CHUTE.

Eodem die.
In Court.
Lord Keeper.
2 Ch. Rep. 104.

THE Lady *Dacres* by agreement made on her marriage with the defendant's grandfather was to have a jointure of 500*l.* *per annum*, or 5,000*l.* in money. She elected the 5,000*l.* in money, and had a decree for it, and the sequestration of the defendant's lands, and a writ of assistance to put

Sequestrators having by virtue of an order power to fell timber, they fell timber to the value of 7,000*l.* and pay over but 2,000*l.* to the plaintiff, for whose benefit the sequestration was taken out.

her in possession, and a decree was made against the defendant, then an infant, (1) for maintenance to be allowed his younger brothers and sisters; and this was to be paid out of the sequestered estate.

DACRES v. CHUTE.

Upon an appeal the *House of Lords* reverse this decree as to the maintenance, which had been paid to the Lady *Dacres*, and which she had applied to the maintenance of the children; and now the cause came back to the court to have the account taken, of what the lady, her agents, or any under her, had received out of this estate. The *Lord Keeper* upon the account allowed the principal sums paid for maintenance towards the sinking of the Lady *Dacre's* debt, but would not let them be applied at the time they were paid; but in one entire sum at the end of the account; and so struck off all the interest for above sixteen years, which came to more than the principal; saying, that this was a hard case, and damages were in the power of the court.

Plaintiff not chargeable with more than the 2,000*l.*

In this case the sequestrators had power by order of the court to fell timber; and it appeared by proof in the cause, that the real value of the timber taken by them off this estate amounted unto 7,000*l.* and but 2,000*l.* had been brought to account. And for as much as it did not appear that the Lady *Dacres* had received more than 2,000*l.* on account of the timber, the *Lord Keeper* would not charge her further, saying, the sequestrators were the officers and agents of the court, and men must take care to pay their debts at their peril: though the defendant was all this time an infant. (2)

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(1) Vide *Leg* v. *Turnbull*, 2 P. Wms. 409.

(2) Reg. Lib. 1682. A. fol. 861. But this point as to sequestrators does not appear; it came on upon exceptions to the Master's Report, for that in taking the account the Master ought to have charged the plaintiff with a sum of 5,570*l.* for timber cut from the estate in question, over and above the sum of 1,680*l.* allowed upon the said account, as paid the plaintiff by one *Owen*, his agent, but it appearing to the court that the proofs of the defendant were extravagant, representing values and estimates made long after the wood was disposed of, and upon the memory and opinion of witnesses, as well as their credit, and therefore could not be set in the balance with accounts taken at the time, and it not appearing that there was any fraud or underselling, nor any more money received than was placed to account, neither was *Owen* the plaintiff's agent in the management of the woods, but the guardian of the infant defendant might have allowed his account, whether the plaintiff would or no, and in case there had been any over-value or mismanagement which had not appeared, *Owen* ought to be therefore chargeable, and not the plaintiff, the exception was over-ruled.

Case 150.

TWISDEN *versus* WISE.

4 Mali. In Court. Lord Keeper.

Eq. Ca. Ab. 68, pl. 2.

Money in trustees' hands for a feme covert, shall go to the feme, if she survives the baron, and not to his executors.

MONEYS were left in trustees' hands for the benefit of a feme covert, and the husband dies. The question was, whether the wife or the executor of the husband should have it; and decreed for the wife, the husband having made no particular diposition of it.

Case 151.

ALAM *versus* JOURDAN.

Eq. Ca. Ab. 229, pl. 12. S. C. 3 Ch. Ca. 123. S. P.

THERE being but one witness against the defendant's answer, the plaintiff could have no decree. (1)

(1) Vide *Hobbs* v. *Norton*, ante p. 136, and cases cited in not. there.

Case 152.

COMPANY of PEWTERERS *versus* GOVERNORS of CHRIST'S HOSPITAL.

Eodem die.

A devise to a man and the heirs of his body, and if he shall go about to alien, his estate shall cease, and the lands go over to a charity. The devise over is void, it tending to create a perpetuity.

A MAN devises land to one and the heirs of his body, but if he should go about to alien, that then his estate should cease, and from and after the determination of his estate, then he devised the lands to *Christ's Hospital.*

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The question was, if the limitation to *Christ's Hospital* was good.

It was admitted, that this restraint of alienation tended to a perpetuity, and was therefore void; but the fact being, that the estate tail was spent by effluxion, and the donee being now dead without issue, the charity ought to take place, and the limitation was good.

But the *Lord Keeper* decreed against the charity, and said that this was an invention taken up about the time that this will was made, to create a perpetuity; thinking that by limiting an estate over to a charity, the law would be so

careful to preserve the charity, that it would allow of such a limitation, and admit that advantage might be taken of a forfeiture in the case of a charity, which it would not do in the case of a private person: and the intention of the testator plainly appearing to be to create a perpetuity, the limitation was adjudged void. (1)

COMPANY OF PEWTERERS v. GOVERNORS OF CHRIST'S HOSPITAL.

(1) Vide on the doctrine of perpetuities, *Woodford* v. *Thelluson*, 4 Ves. 227. [S. C. on Appeal, 11 Ves. 112.] and Mr. *Hargrave's* argument in that case, in which the cases and principles on that head of learning are fully stated and investigated.

ANONIMOUS.

Case 153.

A. being indebted unto *B.* makes *C.* his executor. *C.* wastes the estate and dies, and makes *D.* his executor, and by his will devises several legacies. *D.* pays the legacies. *B.* exhibits a bill against *D.* the executor of *C.* for his debt due from the first testator, and against the legatees in the will of *C.* to compel them to refund their legacies, there not being now sufficient assets of the first testator.

Decreed that the legatees should refund. (1)

Eq. Ca. Ab. 299, pl. 5. S. P. Legatees paid before creditors where the assets fell short, decreed to refund to an unsatisfied creditor.

(1) Vide *Noel* v. *Robinson*, ante p. 94, and cases cited in note there.

DUKE of NORFOLK *versus* HOWARD.

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Case 154.

15 *Maii.* *In Court.* *Lord Keeper.*

THE matter now coming on to be argued on a bill of review to reverse the decree made in this cause by the late *Lord Chancellor*, errors assigned upon a demurrer were,—1*st*, that it does not appear there was an attornment to him that made the settlement. 2*dly*, that the now plaintiff ought not to be accountable for the profits longer than he received the same. 3*dly*, that at the pronouncing of the said decree the *Chancellor* was assisted with *three* Judges, who were of opinion against the decree. 4*thly*, that the limitation of the term over unto the defendant *Charles Howard* was void. But the

Eq. Ca. Ab. 192, pl. 7. 3 Ch. Ca. 1.

DUKE OF NORFOLK v. HOWARD.

only error insisted on was the fourth, *viz.* that the limitation of the term over was void.

The *Lord Keeper* said, that at the time of the pronouncing the former decree, his opinion was against the decree, and that he had considered of it since, and could not find any reason to alter his opinion; and therefore told them plainly, that this cause came before him with some prejudice, unless they could by new matter or new reasons convince him; and therefore did propose, that the plaintiff should admit the trust of the term to be an estate at law executed to the same uses, and that they should try their title in an ejectment at law; but the defendant's counsel declined it, and insisted their case was much stronger in equity than it was at law; and they relied much upon the trust of a term to be different from the limitation of a term at law.

2 Cr. 459. Pol. 40.

The plaintiff's counsel argued much to the same effect as formerly, and relied upon the case of *Child* and *Bailey*, and *Burges* and *Burges*.

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Trust of a term governed by the same rules in equity, as the limitation of the legal estate of a term is at law.

The *Lord Keeper* declared he saw no reason to change his former opinion. He said the late *Lord Chancellor* declared upon the hearing of this cause, that the trust of a term was to be governed by the same rules, as the limitation or devise of a term at law was, and therefore thought he was unreasonably pressed by the defendant's counsel, who insisted on the equity of the case, and would make a difference between the limitation of the trust of a term, and a devise of a term or limitation of a term itself. A perpetuity is a thing odious in law, and destructive to the commonwealth: it would put a stop to commerce, and prevent the circulation of the riches of the kingdom; and therefore is not to be countenanced in equity. If in equity you should come nearer to a perpetuity, than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust; which might indeed make well for the jurisdiction of the court, but would be destructive to the commonwealth. And the intention of a man is not always to be pursued in equity: as in the case put by Mr. Serjeant *Maynard*. If a man settles a term in trust for one and his heirs, it shall go to the executor. And he remembered, at the last hearing, it was said that my Lord *Bridgeman* directed this conveyance, and his name was urged to give an authority to the case: but he said, this conveyance, whoever drew it, was certainly a very inartificial con-

Perpetuities odious. *Vid. ante Case* 152.

veyance; for 1*st*, if the words, heirs males, had been left out, it would have been good. 2*ndly*, if there had been a new term created, it would have been good. 3*dly*, as this term is limited, if the honour of *Graystock* had not descended to the present *Duke* himself, but to his issue, then this provision for the defendant had been out of doors. 4*thly*, the limitation to all the several sons in tail, the one after the other, was certainly inartificial; and said it was an hard case: but the rules of law must be observed: and ordered the former decree to be reversed. (1)

DUKE OF NORFOLK *v.* HOWARD.

Note. This decree was reversed in the House of Lords, the 19th *June*, 1685, and the former decree of the *Lord Nottingham* affirmed.

(1) Afterwards, May 18, this matter came on again, the defendants insisting that they ought to have been heard by answer before the former decree was reversed, but the court considered it as mere delay, and to continue in the possession of the said barony, by the rents and profits of which they had received large sums of money, which ought to be repaid to the plaintiffs, and ordered that the plaintiffs be at liberty to proceed as they should be advised, and in the mean time awarded a writ or writs of restitution to be directed to the sheriff for the putting and keeping the plaintiffs in the quiet possession of the barony of *Graystock*, and other the lands and premises in question, Reg. Lib. 1682. A. fol. 517. Vide *Woodford* v. *Thelluson*, 4 Ves. 227. and Mr. *Hargrave's* argument in that case. Note an appeal from the decision in this case is now pending in Dom. Proc. [See it reported 11 Ves. 112.]

TREACKLE *and* COKE.

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Case 155.
Eodem die.
Lord Keeper.

THE assignee of a lease rendering rent, having enjoyed the land six years, assigns over. The bill was to call him to an account for the rent for such time as he enjoyed the land; the defendant pleaded a judgment upon a demurrer at law; and the plea was over-ruled: for though in strictness of law there is no privity of contract to charge the assignee, yet in equity he is most certainly chargeable for such time, as he received the profits.

Eq. Ca. Ab. 47, pl. 3. S. C.

Assignee of a lease rendering rent assigns over, he shall be liable in equity for the rent during the time he enjoyed the land.

The counsel alleged, there were twenty precedents in the case; and the *Lord Keeper* said, if there had not been one, he should not have doubted to have made a precedent in this case. (1)

1 Salk. 81. 1 Show. 340. 4 Mod. 71.

(1) There is an entry of a plea over-ruled, 15th June, 1683, in a case of the name of *Trattle* v. *Cooke*, Reg. Lib. 1682. B. fol. 763. Vide *Goddard* v. *Keate*, ante 88. and cases cited in not. there.

Case 156.

Eodem die.

ASHTON *versus* ASHTON.

Eq. Ca. Ab. 41, pl. 11. S. C.

A witness cannot demur, because the questions asked him are not pertinent to the matter in issue.

A BILL being exhibited to prove a will, and perpetuate the testimony of the witnesses, the defendant upon cross examination of one of the witnesses exhibited an interrogatory to him, to discover what deeds or settlements he knew the testator had made; to which the witness demurred, as not pertinent to the matter in issue.

The *Lord Keeper* over-ruled the demurrer, because he would not introduce such a precedent, as for a witness to demur: it did not concern the witness to examine what was the point in issue. (1)

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(1) But it seems that in prosecution of a contempt for breach of an order of the court, or otherwise, grounded upon an affidavit, the interrogatories shall not be extended to any other matters than what are comprehended in that affidavit or order, and if any other are exhibited, the party examined may for that reason demur to them, or refuse to answer them, vide Lord *Clarendon's* orders, 61.

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UNIVERSITY COLLEGE in OXON. *versus* FOXCROFT.

Case 157.

Eodem die.

2 Ch. Rep. 244. S. C.

If a sequestration for a personal duty may be revived against the heir.

Vid. ante Case 106.

UPON a demurrer the *Lord Keeper* inclined, that a sequestration for a personal duty determined with the death of the party, and could not be revived against the heir; but took time to consider of it, and would be attended with precedents; and the case of *Rockley* and *Burdett* (1) was cited, where it was ruled, that such a sequestration should not bind the feme, who came in for her jointure or dower. (2)

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(1) Ante 58. *Anon.* ante 118. and cases there cited.

(2) This was the case of a charity, Reg. Lib. 1682. B. fol. 522. The demurrer was afterwards allowed, Reg. Lib. 1682. B. fol. 666.

MELLISH *versus* WILLIAMS.

Case 158.
Eodem die.
Ante Case 103.

Williams in his bill of review, assigned for error the subject matter of fourteen exceptions to the Master's Report, which had been formerly over-ruled; and the defendant demurred, for that there was no error appearing in the body of the decree.

Upon a bill of review the party cannot assign for error, that any of the matters decreed are contrary to the proofs in the cause.

The plaintiff's counsel insisted, that these matters being contrary to the proofs in the cause, though they were matters of fact, they might be examined in a bill of review upon the proofs already taken; for the rule of the court is, that there must be error appearing in the body of the decree without further examination of matters of fact; which implies, that if it can be done without farther proof, a decree may be reversed for errors which may be made out by proofs already taken in the cause: but that was utterly denied by the defendant's counsel and the court: for that only errors in law could be assigned; or new matter discovered since the decree made, and that with leave of the court. (1)

But must shew some error appearing in the body of the decree, or new matter discovered since the decree.

(1) Vide *Price* v. *Keyte*, ante 135. 174. And for further rules as to bills *Fitton* v. Earl of *Macclesfield*, post 292. of review, *Anon.* 2 P. Wms. 283. and Sir *Simon Fanshaw* v. ———, Hard. cases in not. there.

POPHAM *versus* BAMFIELD.

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Case 159.
18 *Maii.*
In Court.
Lord Keeper.
Ante Case 73.

This cause came on to be re-heard; but *Lord Keeper* did not vary the former decree. He said, the difference was, whether this case lay in compensation or not: for where there can be a recompence made, this court will relieve against such a condition: and therefore directed a Master to look into it, and see what recompence Mr. *Popham* had made his son by his will: and declared, if a compensation was made, he would relieve against the breach of the condition: but in case a sufficient compensation was not made, he would then consider farther of it. (1)

(1) Reg. Lib. 1682. B. fol. 515.

Case 160.

VERMUDEN *versus* READ.

Eodem die. In Court. Lord Keeper. Ante Case 64.

THIS case being likewise re-heard, the *Lord Keeper* thought not fit to aid the complainant, or to make a better case for him in equity than he had at law upon the articles; but thus far only, that whereas Sir *Compton Read* by the articles had a power to retain the 4,000*l.* at 3*l. per cent.* interest, his Lordship decreed, that Sir *Compton* should either pay the money, or that the complainant should hold the land absolutely for his life. (1)

(1) The decree on the re-hearing was, that the plaintiff was well intitled to an estate for life, in a moiety of the manor of *Denford*, and the lands and premises thereto belonging, and to an account of the profits thereof, since the death of his wife, and that possession thereof be delivered to him accordingly, and the defendant, Sir *Edward Read*, was to make good to the plaintiff interest on the said 4,000*l.* at the rate of 5*l. per cent. per ann.* up to the time of the death of his said wife, Reg. Lib. 1682. B. fol. 510. *Gell* v. *Vermuden*, 2 Freem. 199.

Case 161.

NOTT *versus* HILL.

Eodem die. In Court. Lord Keeper.

2 Ch. Rep. 120. Eq. Ca. Ab. 275, pl. 1. Cited 2 Vez. 145. A purchase of a reversion from an heir in the life of his father at an under-value set aside; though if the heir had died before his father, the purchaser would have lost all his money. *Ante Case* 134. *Vid. post Case* 268.

THE plaintiff being intitled to an estate tail, after the death of Sir *Thomas Nott* his father, in a house at *Richmond*, in *Surrey*, which, if in possession, was worth to be sold about 800*l.*; and being cast off by his father, and destitute of all means of livelihood, did in 1671 for 30*l.* paid him in money, and 20*l. per ann.* secured to be paid him during the joint lives of him and his father, absolutely convey his remainder in tail to the defendant *Hill's* father and his heirs. (1)

Note.—This decree not being signed and enrolled, the cause was re-heard before the *Lord Chancellor Jefferys*, 27th *May*, 1687, who reversed the Lord *Guildford's* decree, and confirmed the decree made by the Lord *Nottingham*, declaring, he took *Hill's* purchase to be an unrighteous bargain in the beginning; and that nothing which happened afterwards could help it.

*The plaintiff's father lived 10 years after this conveyance; and after his father's death, plaintiff brought his bill to be relieved against this conveyance, charging, that it was in-

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(1) It appears upon the pleadings that the plaintiff received no more than the 30*l.* and the 20*l. per ann.* for five years, and no longer, Reg. Lib. 1686. B. fol. 656.

tended to be only as a security; and though there was no proof to that purpose, and the deed was absolute; and though *Hill* had lost all his money, if the plaintiff had died in his father's life-time, yet upon the first hearing of this cause, 20th *June*, 34 *Car. II.* the Lord *Nottingham* decreed a redemption.

NOTT v. HILL.

And this cause being now re-heard before the *Lord Keeper*, he reversed the Lord *Nottingham's* decree, and declared, he did not see how he could relieve the plaintiff: if it be to be declared a law in *Chancery*, that no man must deal with an heir in his father's life-time, that were something; but as it now stood, he saw no reason to relieve the plaintiff: but dismissed the bill. (1)

(1) Reg. Lib. 1682. B. fol. 482. Vent. 359. *Batty* v. *Lloyd*, ante 141, Sed vide this decree reversed, post 2 vol. 27. Vide *Barney* v. *Tyson*, 2 and cases cited in not. there.

EARL of MACCLESFIELD *versus* FITTON.

Case 162.

19 *Maii.*

In Court. Lord Keeper.

THE bill was to have the redemption of a mortgage of the manor of *Bosley* and *Siddington*, in the county of *Chester*, that was formerly the estate of Sir *Edward Fitton*, which mortgage had been assigned to the defendant *Fitton*. The bill was exhibited so long since as *Feb.* 1662. But being then put off for want of proper parties, the plaintiff claiming the estate by the will of Sir *Edward Fitton*, and had not brought the co-heirs to a hearing, and so the cause slept till now, the Lord *Macclesfield* being all the while in possession.

Eq.Ca. Ab.287, pl. 2. 329, pl. 1. S. P. 2 Ch. Rep. 44. 3 Ch. Rep. 43. S. C.

Mortgagee assigns his mortgage to *J. S.* who pays off the principal and the interest which is considerably in arrear. Whether this interest shall be reckoned principal against the mortgagor.

The points now insisted on, were two.

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1*st.* Upon the assignment to the defendant *Fitton*, the debt was stated betwixt him and the mortgagee, and some of the co-heirs, that were then looked upon to have a right to the redemption: and the defendant's counsel insisted, that this ought to conclude the plaintiff, as a stated account: but the plaintiff being no party thereunto, *that* was over-ruled by the court.

2*dly*. There being great arrears of interest due at the time of the assignment, which were paid by Mr. *Fitton*, the original mortgage-money being but 1,500*l.* and he paid upon

EARL OF MACCLESFIELD v. FITTON.

the assignment 2,300*l.* The question was, whether the 800*l.* paid for interest then in arrear should be reckoned principal, as to the defendant *Fitton*, and carry interest with it. (1)

For the plaintiff it was insisted, interest was never made principal in such a case, unless the mortgagor had joined in the assignment; and they cited the case of *Porter* and *Hubbart*, (2) where in a like case it was decreed, that interest should be reckoned principal; but for that reason the decree was reversed in the *House of Lords*. (3)

But the *Lord Keeper* said, that precedent would not weigh much with him: he was of counsel in the case, and it was hard in all its circumstances; for there the mortgage being in the late times, although the mortgagor received all the profits without interruption, when things were dearer than ordinary, by reason of the troubles in other parts of the kingdom, yet in that case the *Lords* would not allow of 6*l. per cent.* interest, but reduced the interest to 4*l. per cent.* But although he thought it reasonable that the interest paid upon the assignment should be reckoned principal; yet he would not now make a new precedent; but directed the defendant's counsel to search for precedents, and if they could find any one, he would follow it in this case; but the plaintiff's counsel affirmed, there was no such precedent. (4)

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(1) Mortgagee enters, and the profits are not sufficient to answer the interest, yet the arrears shall not carry interest, but the costs and charges must, *Procter* v. *Cooper*, Trin. 1700. Pre. Ch. 116.

(2) 3 Ch. Rep. 78. Nelson 150.

(3) The general rule on this head is, that if assignment of mortgage is made with the concurrence of the mortgagor, the interest paid by the assignee to the mortgagee shall be considered as principal; otherwise, if assignments made without consent of mortgagor, or colourable, and it is so stated and considered in *Ashenhurst* v. *James*, 3 Atk. 271. Vide *Howard* v. *Harris*, post 194, and cases cited in not. there. *Gladman* v. *Henchman*, post 2 vol. 135. *Smith* v. *Pemberton*, 1 Ch. Ca. 67-68. Lord *Ossulston* v. Lord *Yarmouth*, Salk. 449, where per *Cowper*, Lord Chan., to make interest principal it is requisite that interest be first grown due, and then an agreement concerning it may make it principal. Bac. Abr. 104, and cases in margin. *Matthews* v. *Walwyn*, 4 Ves. 118, and cases there cited. But a prior incumbrancer cannot turn interest into principal, to the prejudice of subsequent incumbrancer, after notice, *Digby* v. *Craggs*, Amb. 612. As to compound interest, vide *ex parte Bevan*, 9 Ves. 223, and cases there cited. The result, however, of the cases seems to be, that the court will be guided very much in its decisions on this subject of equity, by the particular circumstances of the case, with reference to the rule.

(4) Afterwards, 7th July, this cause came on before the *Lord Keeper*, "and "his Lordship, after declaring the "plaintiff entitled to redeem, declared "his opinion in this case, and also as "a rule in all other cases of this nature, for the future, that where a "mortgagee and assignee do *bonâ fide* "make up an account of principal and "interest, without any design to charge

" the mortgaged estate, and fairly pays " his money principal and interest, and " takes an assignment, all such money " as was paid upon the assignment " ought to carry interest from the time " of such assignment, but if there was " not so much money due for principal " and interest at the time of such as- " signment as is mentioned in the as- " signment mortgagor ought to have li- " berty to contest the same, and the " account ought so far to be open, and " doth order and decree the same ac- " cordingly, and that the Master to " whom by the said former order the " account stands referred, is to proceed " in the reference accordingly, with " this further direction, that the said " defendant *Fitton*, shall be charged " by way of discount on the said mort- " gage, for what profits the father of " the defendant, the defendant him- " self, or his trustee, or any other per- " son on his behalf, hath received out " of any other part of Sir *Edward Fit-* " *ton's* estate, not within the mortgage." Reg. Lib. 1682. A. fol. 669. N. B. This cause is entered in the Register's Book in the name of *Earl of Macclesfield* v. *Jolliffe*.

CRAWLE *versus* CRAWLE.

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Case 163.

21 *Maii.*

In Court.

Lord Keeper.

This court will not order a writ of error in a criminal case to be sealed, till it is first signed and allowed by the Attorney-General.

Writ of error in a criminal matter not due *ex debito justitiæ*. *Post* Case 168.

A MAN being indicted for not coming to church, and found guilty, application was made to Mr. *Attorney-General*, that they might bring a writ of error, but he refused to allow thereof; and thereupon Mr. *Wallop* this day moved the *Lord Keeper* for a writ of error: but the *Lord Keeper* told him that though he had the custody of the great seal, yet he could make no use thereof, but according to the course of the court; and therefore could not put the seal to a writ of error till it had been first signed and allowed by Mr. *Attorney*: and he took it, that a writ of error in a criminal matter was *ex gratiâ Regis* in all cases, but where provision is made for the same by the statute, and is not due *ex debito justitiæ* or *de cursu*, as Mr. *Wallop* would have it: (1) but if there were real error in the case, and a writ of error was not sought for delay, their way was to petition the *King*, and he would give directions for inspecting the proceedings, to see if there was real error, or whether a writ of error was sought purely for delay: and Mr. *Attorney* said, that *Crawle*

(1) *Quære.* Whether in all criminal cases writs of error, though not due *de cursu*, are not on sufficient probable cause shewn to the *Attorney-General*, granted *ex debito justitiæ* (except as to writs of error to reverse attainders in capital cases, and which are *ex gratiâ*, and granted only by express warrant, under the King's sign manual, or at least by the consent of the *Attorney-General*)? Marquis of *Winchester's* Case, Cro. Car. 504. *Gargrave's* Case, Roll. Rep. 175. *Queen* v. *Foxby*, Salk. 266, pl. 12. *Rex* v. *Wilkes*, Trin. 8 Geo. III. B. R. And it was resolved by ten Judges against two, that a writ of error is of right in all cases, except treason and felony, *Reg.* v. *Paty* and *Others*, Salk. 504.

CRAWLE v. CRAWLE. being indicted upon the *Stat'* 3 *Jac'*, (1) no error could avail him; and the indictment could not be quashed, nor the proceedings avoided, otherwise than by conformity.

(1) 3 Jac. 1. cap. 4. sec. 16.

Case 164.
26 *Maii.*
In Court.
Lord Keeper.

TURNER *versus* CRANE.

Feme mortgagee in fee of a copyhold marries, and dies, living the husband. Whether the husband, as administrator to the wife, or the heir shall have the benefit of the mortgage, there being no covenant to pay the money.

A FEME sole having a mortgage in fee of a copyhold marries; and dies leaving issue, which issue is admitted and dies, and then the husband as administrator to his wife claims title to this copyhold, as being a mortgage, and so part of his wife's personal estate. (1)

The question being now between the husband and the *heir at law; the *Lord Keeper* declared, he would be attended with precedents; but said, he did not much regard what had been objected, that the issue of the feme had been admitted by the husband. But all he scrupled was, that in this case there was no covenant for the payment of the mortgage money, which alone gives the executor title to the mortgage money: (2) and although it was urged, that there could be no such covenant in the surrender of a copyhold, and that it would be unreasonable and inconvenient to have one law, as to freehold mortgages, and another as to copyhold; yet he would make no decree in it, till he should be attended with precedents. (3)

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(1) It was stated in the bill, that this mortgage was taken into consideration as part of the wife's fortune, on the making the settlement on their marriage by the plaintiff, and it appears that the mortgage money not being paid, the wife was admitted, and received the rents several years before the marriage, and that upon her death her daughter and heir was admitted, being an infant by her guardian, and received the rents till her death, leaving her aunt, the wife of the defendant, her heir, who was thereupon admitted, and received the rents, R. L.

(2) But covenant in mortgage deed not necessary to make a mortgage, *Meynell* v. *Howard*, Pre. Ch. 61. *Cope* v. *Cope*, Salk. 449. *Floyer* v. *Lavington*, 1 P. Wms. 270. *King* v. *King*, 3 P. Wms. 360, and cases cited in note there, and all Welch mortgages, and most copyhold mortgages are without a covenant, *Lawley* v. *Hooper*, 3 Atk. 280. Where mortgage shall or shall not be considered as personal estate, vide *Wynn* v. *Littleton*, ante, p. 4, and cases cited in note there. With respect to the priority of application of real assets, where the personal estate is either exempt or exhausted, vide cases cited by Mr. *Cox*, at the latter end of his note to *Howell* v. *Price*, 1 P. Wms. 294.

(3) Reg. Lib. 1682. B. fol. 550. It was afterwards decreed that the mort-

gaged premises should go to the heir, Reg. Lib. 1682. B. fol. 660. Cited in *Canning* v. *Hicks*, post 412. N. B. In this case no covenant to pay the mortgage money to the executors and administrators, and no debts due or owing by the mortgagee.

DE

TERM. S. TRINITATIS,

35 *Car. II.* 1683.

IN CURIA CANCELLARIÆ.

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ANONIMOUS. Case 165.

LORD KEEPER. If a cause has slept twelve months in Court; there shall be no proceedings had upon it, without first serving a *subpœna ad faciendum attornat.* Eq. Ca. Ab. 4, pl. 6. 350, pl. 1.

ANONIMOUS. Case 166.

WHERE a man is arrested upon an attachment, the contempt shall hold good, though no affidavit be filed at the time of taking forth the attachment, if it be filed before the return of it. (1) Eq. Ca. Ab. 15, pl. 10. 350, pl. 2.

(1) Probably *James* v. *James*, Reg. Lib. 1682. A. fol. 600, where the plaintiff's bill having been dismissed with costs, and the costs taxed, and a subpœna served for them, an attachment with proclamations was afterwards issued and delivered to the sheriff, whose under-sheriff would not let the plaintiff be arrested, and this motion was for an attachment against the under-sheriff and a messenger against the plaintiff; the attachment was ordered, and the plaintiff undertook to enter, and afterwards did enter his appearance with the Register. But the practice is now settled contra, and an affidavit must be filed previously to the issuing an attachment, *Broomhead* v. *Smith*, 8 Ves. 357.

Case 167. **CREED *versus* COLVILLE.**

15 *Junii.*
In Court.
Lord Keeper.
2 Ch. Rep. 75.
Gray v. *Colville.*
Whether the trust of an estate in fee descended upon the heir, is liable in equity to the satisfaction of a debt by bond, wherein the heir is bound.

THE single point of this case was, whether the trust of an estate in fee descended upon the heir is liable in equity to the satisfaction of a debt by bond, wherein the heir is expressly bound? (1)

[173] The late *Lord Chancellor* had decreed it assets; but upon a re-hearing before the *Lord Keeper*, he seemed doubtful. (2)

For the heir against the decree it was said, that this point had formerly been settled upon great advice in the case of *Box* and *Bennett*, which was heard by the *Lord Chancellor*, with the assistance of the *Lord Chief Justice Hales*, and Mr. *Justice Wadham Windham*. And that this decree was unreasonable, in that an account of the profits was decreed during the infancy; whereas at law if the heir is bound in the bond of the ancestor, and after the death of his ancestor is sued during his infancy, the *parol* must demur, and the plaintiff cannot have judgment against the infant, neither are the profits liable, during his minority.

But for the decree it was argued, that the precedent of *Box* and *Bennett* was looked upon as a hard case, and had never carried any great authority with it; it being a precedent of the *Judges* making, who look upon the court of *Chancery* as precarious in its jurisdiction, and therefore, as much as may be, are for restraining it to the rules of law: but a trust, being a creature of this court, ought to be governed solely by the rules of equity, and equity ought to be conformable throughout; and therefore why should not the trust of an inheritance be assets, as well as the trust of a term? an equity of redemption is every day made assets in equity; and what reason can be given, why in equity a trust of an inheritance should not be assets, where the inheritance

(1) Vide *King* v. *Ballet*, post 2 vol. 248.

(2) *Quære*. Whether the true question here is not whether the trust should be immediate assets in the hands of an infant heir, in respect that *at law* the parol shall demur during the nonage, for the general question appears to be settled by the statute of Frauds, 29 Car. II. ch. 3. sec. 10. that the trust of an inheritance shall be assets.

itself, had it not been in trust, would have been assets at law?'

CREED v. COLVILLE.

Whether the parol shall demur in equity, in case of a descent of a trust to an infant.

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As to the profits during minority, they said, that was not insisted on by them, though they had no precedent in equity, that the *parol* should demur; but infants were there suable. (1)

Lord Keeper.—I know the case of *Box* and *Bennett* has had hard words given it, and been much railed at; but the decree in that cause was made upon great advice, and he did not know, how he could be better advised now; and said, there was a difference between the case of an heir, and the case of an executor; and therefore the trust of a term and the trust of an inheritance are not the same thing, as to this point: for whatever money comes to the hands of the executor, either by sale of the term, or if money be decreed to him in this court, will be assets: (2) but if an heir, before an action brought, sells and aliens the assets, the money is not at law liable in his hands; (3) unless the sale were with fraud or collusion; as if an heir sell and buy again, there the new purchased lands will be assets. And as to an equity of redemption, he said, that if a man had a mortgage and a bond; before the mortgage should be redeemed by the heir the bond ought to be satisfied; (4) but he did not know that an equity of redemption should be assets in equity to all creditors: and mentioned Mr. *Baron Weston's* case against Mrs. *Danby*, which was thus:

Baron Weston had a debt due to him by bond, wherein the heir was bound, but it happened that for three descents the heir was still an infant, and so the *parol* demurred at law,

(1) Vide *Scarth* v. *Cotton*, Forr. 198. *Davison* v. *Goddard*, Gilb. 66. *Uvedale* v. *Uvedale*, 3 Atk. 118. Where on circumstances a decree was made against infant heir at law and devisee, with liberty to shew cause, within six months after attaining his age. But where lands descend on an infant the parol shall demur, *Chaplin* v. *Chaplin*, 3 P. Wms. 367. Contra where he takes as special occupant, or there be not really a descent, ibid. [See further as to the parol demurring, *Sweet* v. *Partridge*, 1 Cox, 433. 2 Dick. 696. *Mould* v. *Williamson*, 2 Cox, 386. *Plaskett* v. *Beeby*, 4 East, 485. *Powell* v. *Robins*, 7 Ves. 209. *Lechmere* v. *Brasier*, 2 J. & W. 290.]

(2) Vide *Endenne* v. *Fevisame*, Noy. 67. *Harecourt* v. *Wrenham*, Moor, 858. Cited as *Harwood* v. *Wraynam*, 1 Rol. Ab. 920, (G) pl. 5. So damages recovered by executor in an action of trespass shall be assets, though not in the testator, Co. Litt. 124 a.

(3) Sed vide stat. Fr. Devises, 3 Wm. & Mary, cap. 14. sec. 5. 6 Wm. III. cap. 14.

(4) Clearly contra as against other specialty creditors, *Anon.* 2 Vez. 662. *Lowthian* v. *Hassell*, 3 Bro. Ch. Rep. 162. *Hamerton* v. *Rogers*, 1 Ves. jun. 513. *Jones* v. *Smith*, 2 Ves. jun. 376. in which the doctrine and cases on this head are a good deal considered.

CREED v. COLVILE.

till the interest much exceeded the penalty of the bond: and Mrs. *Danby* having been all along guardian to these infants, and received the profits of the estate without paying any debts, and converted them to her own use, the *Baron* therefore brought an action against her, and called her administrator to these children: but the *Baron's* policy did not prevail. (1)

As to the case in question, his Lordship said, he would not throw such a cause out of court without good consideration first had, and that he should be much governed by the
[175] precedent of *Box* and *Bennett*, unless they could shew, that the latter precedents had been otherwise: and directed them to attend him with precedents towards the latter end of the term. (2)

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(1) Vide *Cole* v. *Warden*, post 410. and cases cited in note there. *Plucknet* v. *Kirk*, post 411. And as to the application of rents and profits of the real estate during the minority of the heir, vide *March* v. *Bennett*, post 428. and cases cited in not. there.

(2) Reg. Lib. 1682. A. fol. 818. This cause came on again the 14th of December, when an order was made for the parties to attend the two *Lords Chief Justices* and *Lord Chief Baron*, who were thereby desired to certify their opinion on the question, Reg. Lib. 1683. A. fol. 166. Afterwards in Michaelmas Term, 1684, upon motion of the defendants, it was ordered that unless plaintiffs, the creditors, procured the certificate of *Lord Chief Justice's* and *Lord Chief Baron's* opinion, by the first day of the next term, the bill should be dismissed without further motion, Reg. Lib. 1684. A. fol. 210. No further proceedings appear.

Case 168.

The RIOTERS' Case.

Eodem die.
In Court.
Lord Keeper.

THIS day a motion was made, that the *Lord Keeper* would grant a *mandatory* writ to the *Chief Justice* of the *King's Bench* to command him to sign a bill of exceptions in the case of the *Lord Gray & Al'*. who were convicted for a riot in *London*; and they produced a precedent, where in a like case such a writ had issued out of *Chancery* to the Judge of the Sheriff's Court in *London*.

Eq. Ca. Ab. 414, pl. 2. S. C.

A motion for a *mandatory* writ to the Chief Justice of the *King's Bench* to sign a bill of exceptions, denied, though such writ has issued out of *Chancery* to a judge of an inferior court.

But the *Lord Keeper* denied the motion: (1) for that the

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(1) Vide Stat. West. 2d. 13th Edw. I. cap. 31. 2 Inst. 427. *n.* (4). [et vide *Lessee of Lawlor* v. *Murray*, 1 Sch. & L. 75.]

precedent they produced was to an inferior court, and he would not presume, but the *Chief Justice of England* would do what should be just in the case; for possibly you may tender a bill of exceptions that has false allegations in it, and the like; and then he is not bound to sign it; for that might be to draw him into a snare: and said, if they had wrong done them, they might right themselves by an action on the case: and if this court had a power to grant such a writ, the same was discretionary only, as writs of error are in criminal cases, which are discretionary and not *de cursu*: and said he had a collection of several cases out of the old books of the law, that were given unto him by my *Lord Chief Justice Hales*, which shew that writs of error in criminal cases are not grantable *ex debito justitiæ*, but *ex gratiâ regis;* and in such a case a man ought to make application to the *King*, and he will then refer it to his counsel, and if they certify there is error, the *King* will not deny a writ of error. (1)

THE RIOTERS' CASE.

Ante Case 163.

(1) Vide on this head *Crawle* v. *Crawle*, ante 170.

BARBONE *versus* BRENT.

[176]

Case 169.

19 *Junii.*

In Court.

Lord Keeper.

Money paid in part. Receipts lost. The whole recovered at law. No discovery after a verdict.

THE bill was to have an account, setting forth, that the plaintiff had bought several goods of the defendant, and had paid him several sums of money in part of satisfaction, but the plaintiff having lost the receipts and acquittances, the defendant had recovered the whole value of the goods at law.

The defendant demurred to this bill, because it appeared of the plaintiff's own shewing, that the defendant had recovered at law.

For the plaintiff it was insisted, that if this case upon the bill was true, which by the demurrer is admitted so to be, the plaintiff ought to be relieved in equity, as to the money overpaid.

Lord Keeper. If a man pays money in part of satisfaction, and afterwards the whole value of the goods is recovered against him at law, the money so paid upon that ac-

BARBONE v. BRENT.

count becomes money received for the use of him that paid it, and he may recover it in an action at law. (1)

But it was answered by the plaintiff's counsel, that though that may be true, where the whole debt is recovered, yet it would not be so in this case, because here the jury had allowed some payments and made some abatement of the full value, but had not allowed all the payments; because the now plaintiff could not produce his receipts: and now if they should bring an action at law for the money so over-paid, they could not make out what payments the jury allowed and what not. *Sed non allocatur.*

[177] It was then insisted by the plaintiff's counsel, that they were intitled to have a discovery in this court, in order to enable them to proceed at law, they having lost their receipts and acquittances.

Lord Keeper. After a verdict at law you come too late for that, and I see no reason why the defendant should be put to answer. Allow the demurrer. (2)

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(1) Vide *Moses* v. *Macferlan*, 2 Burr. Rep. 1005. [But see *Marriott* v. *Hampton*, 7 Term Rep. 269. *Philips* v. *Hunter*, 2 H. Bl. 414. *Brisbane* v. *Dacres*, 5 Taunt. 160.]

(2) Reg. Lib. 1682. A. fol. 619. There are two divisions under this head of equity, 1st, changing the venue: 2d. Relief against a verdict, and in both the court acts with great circumspection, and only where the application is founded on clear fraud, partiality, corruption, perjury in the witnesses, or new evidence discovered which could not possibly be made use of in the first. In *Ewelme Hospital* v. *Andover*, post 267, the court dismissed a bill to change the venue, but for what reason does not appear. But in Sir *William Tyrringham's* Case, cited *Earl of Kildare* v. *Eustace*, post 437, the court changed the venue, on the ground that by reason of the power of one of the parties, right could not be had in the county first named. In *Hennell* v. *Kelland*, 1 Eq. Ca. Ab. 377, pl. 2, the court on bill filed, granted a new trial, on the ground that a note was found after the first trial, for the want of which a verdict was found against him. So on bill filed, wherein forged bond suggested, and verdict recovered thereon, by surprise, all the pretended witnesses being dead, *Codrington* v. *Webb*, post 2 vol. 240. But the court would not grant a new trial, merely on the suggestion that the party was not apprised of the new evidence on the first trial, *Richards* v. *Symes*, 2 Atk. 319. So on a bill filed the Court refused a new trial in *Tovey* v. *Young*, Pre. Ch. 193, post 2 vol. 437. But no reason stated. And in *Barker* v. *Holden*, post 316, the court refused to grant a new trial on bill filed, on the ground of excessive damages. These appear to be most of the old cases on this subject, where bill filed for relief after verdict. None have appeared lately, as the courts of law have grown more liberal in their decisions on motions there for new trials. As to motions for new trials on issues, directed out of Chancery, vide *Stace* v. *Mabbot*, 2 Vez. 553. *Richards* v. *Symes*, 2 Atk. 319. *Baker* v. *Hart*, 3 Atk. 542. Lord *Faulconberg* v. *Pierce*, Amb. 210. *Pultney* v. *Warren*, 6 Ves. 90.

Case 170.
Eodem die.
In Court.
Lord Keeper.

PORTINGTON *versus* TARBOCK.

Whether an appeal will lie to this Court from a decree in a court of equity in a *County Palatine.*

THE bill was a bill of *Review* and *Appeal* to set aside a decree in the Court of *Exchequer* in the *County Palatine* of *Chester*, made in a cause wherein the now defendant was plaintiff, and the now plaintiff was defendant; and it was charged in the present bill, that there was no sufficient ground for making the said decree.

The defendant put in a plea, and set forth that the parties to the said decree were, and long had been, inhabitants in the said *County Palatine*, and that the lands mentioned in the decree lay within the said *County Palatine*, and matters in question arose there; and that by the ancient privileges and usages in the said *County Palatine*, such parties and matters were and ought to be sued and impleaded there, and not elsewhere, and that the decree in itself was just, and not questionable in this court.

For the plaintiff it was insisted, that the Court of *Chancery* was the supreme and high Court of Equity; and it was therefore but just and natural, that an appeal should lie to it, to correct the mistakes and abuses of the inferior courts.(1) And it was said by the counsel, that although such bills had not been frequent here, yet they were not without precedents of the like nature; and they cited the precedent of *Edwish* and *Davis*, where such a plea was over-ruled, and the defendant put to answer: and the case of *Humphreys* and [178] *Griffith*, where in the equity courts of *North Wales* they had decreed an infant to convey; and the decree was for that reason reversed in this court; (2) and they cited a case in the Lord *Nottingham's* time, where an appeal from the *Mayor's* Court in *London* was allowed; but they were not relieved in that case, because they had first brought a *certiorari* bill, and afterwards consented to a *procedendo*, and by that had disclaimed the jurisdiction of this court; and therefore the court would not entertain them upon their appeal.

The counsel for the defendant chiefly insisted on the prac-

(1) Vide *Addison* v. *Hindmarsh*, post 443.

(2) As to the jurisdiction of Chancery on appeal from the court of Great Sessions in *Wales*, vide *Galbraith* v. *Neville*, B. R. E. 29 Geo. III. in note to *Walker* v. *Witter*, Doug. Rep. 5.

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tice of this court, that such bills had not been usual, and that most of the cases cited were *certiorari* bills; and that all courts of equity were by prescription, and therefore were all equal; and no appeal would lie.

A *certiorari* bill may be brought to remove a cause out of a court of equity in a *County Palatine* to this court.

The *Lord Keeper* declared, he thought it reasonable, that an appeal should lie. There is no doubt but a *certiorari* bill might have been brought to remove this cause: but no bill of review can be brought, for that is only to re-inspect what the same court had before done. As to an appeal it seemed to him reasonable. 1st. Because this court is the high and supreme court of equity, and the others are but inferior courts. 2dly. Even from this court there formerly lay an appeal to the *King*, and that was the course, till the *House of Lords*, which is the highest court, had frequent meetings, and there determined all matters upon appeal: and if from this court there lies an appeal to the *King* himself, why should there not lie an appeal from inferior courts to this court, where the *Chancellor* or *Keeper* sit by the *King's* commission. There is no doubt, but this court may hold plea for matters within the *County Palatine*, because the parties may live out of the jurisdiction. (1)

Vid. post Case 181 & 182, where it was adjudged an appeal would not lie, and the plea in this case was allowed.

The *Lord Keeper* would do nothing in the case at this time, but directed them to attend him with precedents.

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(1) Vide *Addison* v. *Hindmarsh*, post 442. The court of the county Palatine of *Chester* is an original superior court. *Pegge* v. *Gardner*, 1 Lev. 208. Et vide *Strode* v. *Little*, ante, p. 58.

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[179]

The Lady BODMIN *versus* VANDENBENDY.

Case 171.

Eodem die.

In Court.

Lord Keeper.

Eq. Ca. Ab. 333, pl. 1. S. P.
Ibid. 219, pl. 3.
2 Ch. Ca. 172.
Show. P. C. 69, 70.

Bill by a dowress to remove a trust term.

THE bill was, that the plaintiff might by the aid of this court be let in to try her title at law, for dower of the lands in question, there being a term for years standing out, that had been raised for particular purposes, and she offered by her bill to discharge the trust of the term, and prayed that the term might be made attendant on her dower.

Defendant pleads himself a purchaser, but does not deny notice.

To this the defendant pleaded himself a purchaser, (but

did not plead himself a purchaser without notice) (1) and insisted on the benefit of the term to protect his purchase.

The defendant was ordered to answer. (2) Ordered to answer.

(1) Plea of purchase for valuable consideration must also deny notice, *Anon.* 2 Vent. 361. And must allege seizin and possession in the vendor, *Trevanian* v. *Mosse*, post 246. [*Head* v. *Egerton*, 3 P. Wms. 281. *Attorney-General* v. *Backhouse*, 17 Ves. 290.] But need not set forth the consideration paid, *More* v. *Mayhow*, 1 Ch. Ca. 34.

(2) Reg. Lib. 1682. A. fol. 723. The words of the order are, "That the "defendants do fully answer the plaintiff's bill, and that the defendant's "plea and demurrer be set aside, only "in order that the complainant may "prefer her exceptions to so much "thereof as tends to answer, in case "the defendant hath not thereby fully "answered so much of the plaintiff's "bill as he therein answereth unto" "but the benefit of defendant's plea "and demurrer is to be saved to him "at the hearing." Et vide *Brown* v. *Gibbs*, Pre. Ch. 97. *Wray* v. *Williams*, ibid. 151. 1 P. Wms. 137, S. C. But a dowress shall have the trust of a satisfied term removed against the heir at law, Lord *Dudley* and *Ward* v. Lady *Dudley*, Pre. Ch. 241. But the *Master of the Rolls* distinguished that case expressly from the case of *Bodmin* v. *Vandenbendy*. Vide *Watts* v. *Bullas*, 1 P. Wms. 110, in not. (2) et vide post 356, S. C. *Wynne* v. *Williams*, 5 Ves. 130. *Maundrell* v. *Maundrell*, 7 Ves. 567. Pow. Law. Mort. 715, et seq. [*Mole* v. *Smith*, Jacob, 497.]

KNIGHT *versus* BAMPFEILD & Al'.

Case 172.

Eodem die.
In Court.
Lord Keeper.

A MAN makes a mortgage, and after forfeiture for non-payment of the mortgage money he marries, and conveys the equity of redemption to trustees, to the use of himself for life, remainder to his wife for her jointure, and afterwards becomes a bankrupt. The commissioners assign this equity of redemption in trust for the creditors, and the assignees state an account with the mortgagee.

Eq. Ca. Ab. 12, pl. 6. S. C.

A jointure made of an equity of redemption: the husband becomes a bankrupt, and the assignees of the commissioners state an account with the mortgagee.

The jointress brings her bill to be relieved against this account, alledging it was not fairly stated, but that the assignees by combination with the mortgagee, had allowed more money than was really due on the mortgage.

If the jointress will be relieved against this account, she ought in her bill to assign particular errors; but leave given to amend the bill.

The defendant pleaded this stated account.

Lord Keeper. The assignees stand in the place of the husband, and the account by them stated ought to be as conclusive as if it had been stated with the husband; and the bill is not right in charging a general fraud in the stating of this account, but the plaintiff ought to have assigned parti- [180]

cular errors in the account; however he gave the plaintiff leave to amend her bill. (1)

(1) The plea was allowed, Reg. Lib. 1682. A. fol. 635. Sed vide *Taylor* v. *Haylin*, 2 Bro. Ch. Rep. 310. Where the bill was dismissed. So in *Johnson* v. *Curtis*, on appeal from the *Rolls*, 3 Bro. 266. As to the length of time permitted by the court to bar the opening of settled accounts, vide *Roberts* v. *Kuffin*, 2 Atk. 113., and cases cited in not. there.

Case 173.

CROSSEING *versus* HONOR.

Eodem die.
In Court.
Lord Keeper.

Eq. Ca. Ab. 40, pl. 9. S. C.

Bill brought by an obligee in a bond against the heir of the obligor for a satisfaction of the debt out of assets, but it is not shewn that the heir was bound in the bond.

BILL brought by the obligee in a bond against the heir of the obligor, alledging that he having assets by descent ought to satisfy this bond.

The defendant demurred, because the plaintiff had not expressly alledged in the bill, that the heir was bound in the bond; and though it was alledged that the heir ought to pay the debt, yet that was held insufficient, (1) and the demurrer was allowed. (2)

A good cause of demurrer.

(1) The heir is not bound by obligation, unless he is expressly named therein, Shep. Touchst. 376. Nor by deed, unless expressly named, ib. 178.

(2) In this case a plea and demurrer were put in, and both allowed, but without costs, Reg. Lib. 1682. A. fol. 622.

Case 174.

RUTTER *versus* RUTTER.

Eodem die.
In Court.
Lord Keeper.

A freeman of *London* leaves the city and lives in the country 20 years; marries, and makes his wife a jointure and dies. The wife shall have her share by the custom.

A MAN that was a freeman of *London* leaves the town, and lives in the country for twenty years together, and marries, and makes his wife a jointure, and dies. She exhibits her bill to have her share of her husband's personal estate according to the custom of the city of *London*. The defendant pleaded the husband's leaving the town, and living twenty years in the country, and the jointure. But the plea was disallowed. (1)

(1) Reg. Lib. 1682. B. fol. 609. So *Cholmely* v. *Cholmely*, post 2 vol. 82. *Webb* v. *Webb*, ibid. 110. Contra as to the province of *York*, which is local, and does not follow the person, *Cholmely* v. *Cholmely*, ub. sup.

ANONIMOUS.

Case 175.

Eodem die.
In Court.
Lord Keeper.
Eq. Ca. Ab. 13, pl. 3. S. P.

WHERE a man brings a bill for discovery of a bond, he need not make oath he has lost the bond;* as he must do, if the bill was to be relieved for the duty. (1)

Bill for discovery only of a bond lost. No affidavit necessary. Otherwise, if relief prayed. *Ante Case* 56, *con'*. *Post Case* 241, *accord.*

[181*]

(1) Vide *Godfrey* v. *Turner*, post 247. *Nicholson* v. *Pattison*, 310. Affidavit seems not to be necessary, if the relief prayed extends merely to the delivery of the instrument, or is such as can only be given in a court of equity, Nelson Rep. 78, Mitf. Tr. 113. But where the bill is for the discovery of a particular bond, suggested to be lost, or for discovery of a particular deed, for wan tof which the plaintiff could not recover his debt at law, or the possession in ejectment, in these cases it is fit he should make oath that he himself has not the bond or deed, because if he had, his remedy is proper and open at law, and then he is not to put another to the unnecessary expence of an answer, to deny his having it, *Anon.* Pre. Ch. 536.

CEVILL *versus* RICH.

Case 176.

20 Junii.
In Court.
Lord Keeper.
Eq.Ca. Ab. 153, pl. 1.
1 Ch. Ca. 309.
2 Ch. Rep. 141.
S. C.

Whether a settlement of land on a daughter upon her marriage will bar her of her share of her father's personal estate by the custom of *London*.

Post Case 213. (1)

UPON a re-hearing; the question was, whether an advancement of a daughter on marriage by land of inheritance was such an advancement as should exclude her from her customary part of the personal estate of her father, who was a freeman of *London*? In the case of the son and heir at law, it was admitted it would not exclude him: but in this case there being two daughters and coheirs, and one being advanced by land of inheritance on her marriage, the case is more doubtful, and the *Lord Keeper* ordered that the *Recorder* should certify the custom of the city of *London* in that point. (2)

(1) Where certified to be no bar in the case of a co-heir.

(2) And decreed to be no bar in the case of an only daughter, *Stanton* v. *Platt*, post 2 vol. 753.

Case 177.

DAVIES *versus* WELD & Al'.

In Court. Lord Keeper.

Eq.Ca. Ab. 386, pl. 5. 2 Ch. Ca. 144. S.C.

Whether a trustee for preserving contingent remainders shall be decreed to join in a sale to pay debts, when there is no probability of issue.

THE defendant *Weld* was the surviving trustee in a settlement made on the marriage of the plaintiff *Davies* and his wife, whereby land was settled upon the baron and feme for their lives, remainder to trustees to preserve contingent remainders, remainder to their first and every other son in tail male. The plaintiff and his wife had been married twelve years, and never had any issue, and having contracted debts, the bill was, that they might be enabled to sell part of their estate for payment of debts.

The defendant, the trustee, by answer set forth the settlement, and confessed the plaintiffs had been married so many years, and had had no issue, and believed they never would have any, and that they had contracted such debts, and submitted to do as the court should direct, so as he might be indemnified.

[182] For the plaintiff it was insisted, that the court in such cases had decreed the land to be sold for payment of debts; and for precedents they cited the case of *Digby* and *Cornwallis*, (1) and Sir *John Tufton's* case, and they said, that necessity does create a natural equity.

But the *Lord Keeper* declared, he did not see how he could make such a decree; for he had known, where people had been married near twenty years without issue, and after had children: but at the plaintiff's importunity he gave time till *Michaelmas* to attend him with precedents. (2)

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(1) 3 Ch. Rep. 72.

(2) Vide *Plat* v. *Sprig* and *Al'*. post 2 vol. 303. Trustees in a marriage settlement for preserving contingent remainders, (there being no issue,) were decreed to join in a sale, the settlement being only of an equity of redemption and the wife consenting to the sale.

Case 178.

LOMAX *versus* BIRD.

Eq.Ca. Ab. 315, pl. 1. S. P.

He that comes to redeem a mortgage, must shew a title to the equity of redemption.

THE plaintiff claiming under the heir general came to redeem a mortgage. The defendant by answer set forth a deed of intail, entitling another person to the equity of redemption.

The plaintiff prayed he might redeem at his peril, but the *Lord Keeper* would not admit him to do it, unless he could make out the estate tail was docked. (1)

LOMAX v. BIRD.

(1) A trial at law was ordered, Reg. Lib. 1682. B. fol. 718. Entered *Lomax* v. *Shalcrosse*. And *Lomax* v. *Leigh*.

THORNE *versus* THORNE.

Case 179.

4 *Julii*. *Lord Keeper*. Mortgage in fee is a revocation *pro tanto* only of a settlement with power of revocation.

THORNE being seized in fee by a voluntary conveyance, settles his lands to the use of himself for life, remainder to his daughter and heir apparent in tail, remainder to his three brothers in tail, remainder to himself in fee, with power of revocation: and seven years after mortgageth those lands in fee, and the condition of the redemption was, that if the mortgagor or his heirs paid the money at the day, he should have the lands in his former estate. The mortgage was made to one of the three brothers that were the remainder men. The mortgage became forfeited, and the mortgagee afterwards purchased of his eldest brother, who was the heir at law.

The third brother brought his bill for a third part, by virtue of the remainder in tail limited to him and his two brothers: and the question was, whether the mortgage was a total revocation or but *pro tanto*. [183]

The *Lord Keeper* declared it was a revocation *pro tanto* only, the mortgagor being to have the lands, on payment, as in his former estate, and decreed it accordingly. (1)

(1) Vide *Perkins* v. *Walker & Al'*, ante 97, and cases cited in note there. *Thorne* v. *Thorne*, ante 141, S. C.

Case 180.

GEORGE TALBOT, . . Plaintiff;
EDWARD BRADDILL, Defendant.

Lord Keeper.
Mortgagor admitted to redeem before the day of payment in the deed.

THE plaintiff being seized in possession of lands of 15*l.* *per ann.* and in reversion after the death of his mother of other lands of about 17*l.* *per ann.* and of other lands after a term of twenty-six years to come of 8*l.* *per ann.* (which estate was subject to incumbrances) did by deed and fine (1) in *March*, 1657, in consideration of 320*l.* demise those lands to the defendant for 99 years, at 5*s.* *per ann.* rent, upon condition, that if the plaintiff or his heirs should pay the defendant 380*l.* the 25th of *March* which should be in the year 1688, then the conuzees should stand seized to the use of the plaintiff and his heirs: and the plaintiff covenanted for the defendant's enjoyment accordingly.

And now in 1682, twenty-five years after the conveyance, the plaintiff brings his bill to be admitted to redeem the premises, and to have an account of profits from the date of the deed, alledging that though the deed was in that form, yet it was nevertheless agreed between him and the defendant, that it should be a mortgage, and redeemable at any time upon payment of 320*l.* and interest; and though there was no proof of any other agreement than the deed, and that there was a bond to perform the covenants of the deed, and
[184] although it appeared, that the estate consisted much in old buildings and a mill, and that the defendant had laid out above 100*l.* in repairs; yet in regard the plaintiff's mother died within three years after the deed, whereby the revenue exceeded the interest of the money, the *Lord Keeper* notwithstanding there was a contingency at the time of the deed, thought this an unreasonable bargain, and did decree an account of the profits *ab origine*, and a redemption on payment of what the profits fell short of the 320*l.* and interest, and appointed the same to be paid at a day certain, and not to expect till 1688, according to the condition of the deed. (2)

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(1) And recovery, R. L.

(2) And the defendant to be allowed for all lasting improvements, Reg. Lib. 1683. B. fol. 282. Vide post 394, S. C. *Newcomb* v. *Bonham*, ante p. 8.

JENNET & Ux', *versus* BISHOPP & Al'.

Case 181.
14 *Julii.*
In Court.
Lord Keeper.

THE bill was a bill of appeal and review, the cause having been heard and decreed in the *County Palatine* of *Chester*. To this bill the defendants demurred. And after long debate the *Lord Keeper* allowed the demurrer, and declared his opinion to be, that such a bill would not lie: but if any appeal lies, it must be to the *King* himself. (1)

No appeal lies to this court from a decree in a *County Palatine*. See the next case.

(1) An appeal lies to the *Dutchy Court* from the court of equity at *Lancaster*, by act of parliament, sic dict. *Addison* v. *Hindmarsh*, post 442. *Ormerod* v. *Hardman*, 5 Ves. 725.

PARTINGTON *versus* TARBOCK.

Case 182.
Eodem die.
In Court.
Lord Keeper.
Vid. ante Case 170.

THIS bill being of the same nature with the last case the *Lord Keeper* gave the same rule in it, and allowed the plea. (1)

(1) Reg. Lib. 1682. B. fol. 674.

KILLIGREW *versus* KILLIGREW.

Case 183.
Eodem die.
Eq. Ca. Ab. 37, pl. 1. S. C.

THE bill being to be relieved touching a debt due to the plaintiff as executor, the defendant pleaded an *outlawry* of the plaintiff in bar: but the plea was over-ruled, the plaintiff suing in *autre droit* as executor. (1)

Outlawry no bar to the suit of an executor.

(1) Reg. Lib. 1682. A. fol. 644. Vide Co. Litt. 128 *a*. Bac. Ab. 3, p. 5, sec. 3. *Hix* & *Ux*. v. *Harrison*, 3 Buls. 210. *Caroon's* Case, Cro. Car. 9. *Swan* & *Ux*. v. *Porter*, Hard. 60. Contra of excommunication, for the executor cannot proceed in his suit until he be discharged from the excommunication, Went. Off. Ex. 16, 106, 8vo. edition. N. B. The cause is entered in the Register's Book, in the name of *Killigrew* v. Lady *Sayers*.

Case 184.

Eodem die.

Eq.Ca.Ab.234, pl. 5. 367, pl. 1. S. C.

SOMERSET *versus* FOTHERBY.

Bill lies to perpetuate the testimony of witnesses to prove a *modus*. But *Q.* if it will lie to establish a *modus*.

THE bill being to examine witnesses in *perpetuam rei memoriam* to prove a *modus decimandi*, the defendant demurred, for that the bill was to establish a custom against the church, and in prejudice of tythes, that are due *communi jure*: and several precedents were cited, where bills to have a *modus* decreed were upon a demurrer dismissed: but this bill being only to preserve testimony, the *Lord Keeper* thought it reasonable the defendant should answer, and over-ruled the demurrer. (1)

(1) Without costs, Reg. Lib. 1682. B. fol. 690. Lord *Calthorpe* v. *Collins*. In Chan. 1797, where *modus* established. [But a bill does not lie to establish a *modus*, unless the parson has first sued for Tithes in Kind. *Coventry* v. *Burslem*, 2 Anst. 567. n. *Gordon* v. *Simpkinson*, 11 Ves. 509.]

Case 185.

Eodem die.

PRICE *versus* PRICE.

Cro. Eliz. 733.

Plea overruled, because the fraud alleged in the bill was denied in the plea, and not by way of answer.

To the plaintiff's bill the defendant pleaded, he was a purchaser *bonâ fide* for a valuable consideration; but there being several badges of fraud alleged in the bill, though the defendant in his plea had denied them, yet because he had not denied them by way of answer, that so the plaintiff might be at liberty to except, the plea was over-ruled. (1)

(1) Vide *Bailey* v. *Adams*, 6 Ves. 586.

LAST term died Sir Edmond Saunders, Lord Chief Justice *of the* King's Bench, *and Sir* George Jefferies *was this vacation sworn in his room: Sir* Francis Pemberton *this vacation was removed, and Sir* Thomas Jones, *senior* Judge *of the* King's Bench *succeeded him as* Chief Justice *of the* Common Pleas. *And there being two vacancies in the* King's Bench *by the death of* Justice Raymond, *and removal of Sir* Thomas Jones, *Serjeant* Holloway, *and Serjeant* Walcot *were made* Justices *of the* King's Bench. *Sir* Francis Pemberton *came to the bar and practised the first day of the term, although it was rumoured, he was forbid to practise: and he continued a* Privy Counsellor, *till the* King *had struck him out with his own hand. Mr.* Herbert *succeeded Sir* George Jefferies *in the* Chief Justiceship *of Chester.*

In this vacation the Lord Keeper North *was made Baron of* Guildford.

DE

TERM. S. MICHAELIS,

35 *Car. II.* 1683.

IN CURIA CANCELLARIÆ.

Case 186.

ANONIMOUS.

Eq.Ca.Ab.101, pl. 1. S. C.

WHERE a man is to perfect his answer upon interrogatories, or to be examined for a contempt, although the rule of court be, that he shall be examined in four days or stand committed; yet if the party be in the country, he shall have a commission to take his examination.

Case 187.

15 *Octobris.*

In Court. Lord Keeper.

EDMUNDS *versus* POVEY *& Al'.*

Third mortgagee without notice at the time of his mortgage buys in the first incumbrance, being a satisfied judgment. He shall have the benefit of it.

THE principal question in this case was touching the buying in of incumbrances, *viz.* where there are first, second, and third mortgagees, who had all lent their money without notice. The third mortgagee hearing of the two former securities buys in the first incumbrance, to wit, a judgment that was satisfied: and it was strongly insisted at the bar, that though this trade of buying in incumbrances had been formerly countenanced here, yet that it was in truth a thing against conscience, and contradictory to many established rules of law and equity.

[188] But after long debate the *Lord Keeper* told them, he wondered the counsel laid their shoulders to a point, that had been so long since settled, and received as the constant course of *Chancery*. It is true, there have been strong arguments used against the unreasonableness of this practice, and there might be likewise strong reasons brought for the maintaining of it, and so was at first a case very disputable; but being once solemnly settled, as it was in the case of

Marsh and *Lee*, (*a*) he would not now suffer that point to be stirred. (1)

(*a*) 1 Ch. Ca. 162.

The counsel in their own justification replied, that his *Lordship*, when this cause came first before him, had referred it to Sir *Adam Ottley*, to state the case specially, and it now came before him on the master's report, and there was no other point in the case but this; and therefore they supposed his lordship intended they should be at liberty to speak to that matter.

But his lordship declared, he would not change the rule, that had so long prevailed, in this case; but it may be, he might do so, where he found a man designing a fraud, and thought to make a trade of cozening by the rules of the court. (2)

Serjeant *Pemberton* moved, that as to the point of notice he supposed his lordship meant, that a man that buys in a prior incumbrance, must do it without notice of the middle incumbrance, not only when he lent his money, but also at the time when he bought in the prior incumbrance. *Sed non allocatur.* (3)

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(1) Vide *Brace* v. Duchess of *Marlborough*, 2 P. Wms. 491, and cases cited in not. there.

(2) In all these cases it must be intended that the puisne mortgagee, when he lent his money, had no notice of the second mortgage, &c. for that was his sole equity, per *Master of the Rolls*, *Brace* v. Duchess of *Marlborough*, ub. sup. So puisne incumbrancer cannot gain such preference after a decree, and direction to settle the priorities, *Wortley* v. *Birkhead*, 2 Vez. 571.

(3) And injunction which had been obtained dissolved, and defendant to pay the costs of the suit, Reg. Lib. 1683. A. fol. 185.

CHAPMAN *versus* BOND.

Case 188.

29 *Octobris. In Court. Lord Keeper.*

Eq. Ca. Ab. 241, pl. 2. S. C.

A purchaser takes a term in a trustee's name, and the inheritance in his own; this term, unless declared to attend the inheritance, will be assets in equity. If he takes the inheritance in a trustee's name, and a term in his own, it will be assets at law. *Vid.* 2 Ch. Ca. 152. S. P.

WHERE a man takes an assignment of a term in a trustee's name, and the inheritance in his own name; so that by construction in equity the term * is attendant upon the inheritance; this term in equity shall be assets for the payment of debts, as well as a term taken in his own name is assets at law: but with this difference, that the heir shall have the benefit of the surplus of the trust of a term, and not the executor after debts paid: but if a term be expressly de-

CHAPMAN v. BOND.

cleared by deed to be attendant on the inheritance, there such a term shall not be made assets in equity.

Note.—This point was not directly in the case, but came in by way of argument only: and so the difference that had been formerly taken in this case between legal and equitable assets was exploded. (1)

(1) Reg. Lib. 1683. A. fol. 170. *Tiffin* v. *Tiffin*, ante 1. *Thruxton* v. entered *Chapman* v. *Congdon*. Vide *Attorney-General*, post 341.

Case 189.

TREMAINE *versus* TREMAINE.

Bill and answer (the cause being agreed) ordered to be taken off the file by consent of plaintiff and defendant.

THIS cause was between father and son, and there having been great heat and indecent reflections on both sides in bill and answer, and the matter being ended this vacation by compromise; upon motion this day made in court by Mr. *Porter*, the bill and answer were taken off the file by consent.

Case 190.

COMES RANELAUGH *versus* HAYES.

30 *Octobris. In Court. Lord Keeper.*
Eq. Ca. Ab. 17, pl. 6.
2 Ch. Ca. 146. S. C.
Covenant to save harmless. Decreed in specie.

THE Earl of *Ranelaugh* assigns several shares of the excise in *Ireland* to Sir *James Hayes*, and Sir *James* covenants to save the *Earl* harmless in respect of that assignment, and to stand in his place touching the payments to the *King*, and other matters, that were to have been performed by him. The plaintiff the Earl of *Ranelaugh* suggests in his bill, that he is sued by the *King* for 20,000*l.* and that the defendant Sir *James Hayes* by the agreement ought to have paid it; and therefore prays the defendant may be decreed to perform the agreement in specie.

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It was insisted for the defendant, that here was no proper subject for equity, nor any thing that the court could decree; for here was no specific covenant, but only a general and personal covenant for indemnity; (1) and that was not

(1) The covenant on the part of defendant appears to have been that he would indemnify the plaintiff and his estate from all debts, accounts, covenants, breaches of covenants, rents and demands, whatsoever, and from all costs which should come to plaintiff or his estate, by his Majesty, his heirs or successors, and from any creditors or other person to whom any debt should

decreeable in equity; for it sounds only in damages, which cannot be ascertained in this court; especially as this case is, there being no breach of the covenant assigned in the bill: for a suit being brought by the *King*, that is not in itself any breach, for the defendant cannot prevent that. He will defend the suit, and if nothing is recovered, there is no breach. (2)

But the *Lord Keeper* in this case thought fit to decree that Sir *James* should perform his covenants; and directed it to a Master, and that *toties quoties* any breach should happen, he should report the same specially to the court; and the court then might, if there should be occasion, direct a trial at law in a *quantum damnificatus*: (3) and he conceived it reasonable, that Sir *James Hayes* should be decreed to clear the Earl of *Ranelaugh* from all these suits and incumbrances within some reasonable time. (4) And he compared it to the case of a counter-bond; where although the *surety* is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond, this court will decree the *principal* to discharge the debt; it being unreasonable that a man should always have such a cloud hang over him. (5)

A. is bound for *B.* and has a counter-bond. Equity will compel *B.* to pay the debt, though *A.* is not sued.

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be due or payable, for or by reason of the said three parts, or any the covenants or agreements entered into by the said letters patent or articles of agreement in the said indenture mentioned by the plaintiff, and should likewise indemnify plaintiff and his estate, and procure a discharge according to the usual form to the plaintiff for 300*l.* due to the partners. And that he, the defendant, should indemnify the plaintiff from all accounts, payments, charges and actions whatsoever, which the partners might have for or on account of any moneys due by the plaintiff, the then late farmer of his Majesty's revenue in Ireland, for rent or otherwise, R. L.

(2) The breaches assigned in the bill are as follow, "That the defendant "wholly refused to perform the covenants on his part, but in absolute "breach thereof, permits plaintiff to "be prosecuted by his Majesty for his "arrears of rents due to his Majesty, "reserved by the said letters patent, "and also for a large sum of money "borrowed of his Majesty, and applied to the uses of the undertaking," and the bill also charges that the plaintiff is prosecuted by one of the partners for the arrears of certain payments from which the defendant is also obliged by covenant to indemnify plaintiff. R. L.

(3) The *Lord Keeper* gave, as one reason for his decree, "That the computation of damages in such a cause "must depend upon examination of "long and intricate accounts of the revenue of *Ireland*, which cannot be "made upon a trial at law, and a jury "cannot foretel what damages will "after happen, but must give their "verdict upon uncertainties, which "will afterwards occasion suits in this "court." R. L.

(4) One year is the time specified in the decree. R. L.

(5) And it was also ordered, that upon any suit or demand against plaintiff, upon any matter relating to the

said farm, he should give timely notice to defendant, or his clerk in court, to the intent defendant may take all necessary care in defence thereof, to prevent any damage that may come to him thereby. Reg. Lib. 1683. A. fol. 105.

Case 191.

HOWARD *versus* HARRIS.

6 Novembris. In Court. Lord Keeper.
Eq. Ca. Ab. 312, pl. 11. S. P. 2 Ch. Ca. 147. S. C. *Ante Case* 31.

No agreement in a mortgage can make it irredeemable, either after the death of the mortgagor, or upon failure of issue male of his body.

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Mr. Howard settles a jointure on plaintiff his lady before marriage, which proving defective, and not of value according to the marriage agreement, he therefore afterwards makes her an additional jointure of other lands; and afterwards Mr. *Howard*, in 1673, makes a mortgage to the defendant *Harris* for securing 1,000*l.* with interest, in * which (amongst others) part of the lands belonging to the additional jointure was comprised: and in the mortgage there is a special clause of redemption, *viz.* that if Mr. *Howard*, or the heirs males of his body, should in *June*, 1686, pay the principal sum of 1,000*l.* and 60*l. per ann.* interest in the mean time, then Mr. *Howard* or the heirs males of his body might re-enter; and Mr. *Howard* covenants that no one but he or the heirs males of his body should be admitted to redeem this mortgage, and likewise covenants to pay the 1,000*l.* on the —— day of ——— in the year 1686, and 60*l. per ann.* interest in the mean time, by half-yearly payments from the date of the mortgage.

Mr. *Howard* dies without issue; the plaintiff being a jointress of part of the mortgaged lands, and so intitled to redeem the whole, in 1677 exhibits her bill to redeem this mortgage.

The defendant by answer insists, the lands are now become irredeemable.

This cause was heard before the Lord Chancellor *Nottingham*; and now upon the defendant's petition came to be reheard before the *Lord Keeper*, and was by them both decreed for the plaintiff.

For the plaintiff it was insisted,

Restrictions of redemption in mortgages discountenanced in equity. (1)

1*st*. That restrictions of redemption in mortgages have been always discountenanced in this court; and it would be a thing of mischievous consequence, should they prevail; for

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(1) Vide *Newcomb* v. *Bonham*, ante p. 8. and cases cited there. *Talbot* v. *Braddill*, post 395.

HOWARD v. HARRIS.

then it would become a common practice, and a trade amongst the *scriveners*, so to fetter the mortgagors, as to make it impracticable for them to redeem according to the precise letter of the agreement: and the plaintiff's counsel insisted, that there was no more in this case against a redemption, than there was in every mortgage. It is true, here is an express covenant, that none but Mr. *Howard*, or the heirs males of his body, should redeem: and in every mortgage there is a proviso, that in case the money be not paid by such a day, the mortgagee shall hold the land discharged, and not only so, but there is likewise an express covenant for further assurance; so that in every mortgage the agreement of the parties upon the face of the deed, seems to be, that a mortgage shall not be redeemable after forfeiture.

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Maxim in equity that an estate cannot at one time be a mortgage, and at another time cease to be so by the same deed.

2dly. It was argued, that it was a maxim here, that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed: and a mortgage can no more be irredeemable, than a distress for a rent-charge can be irrepleviable. The law itself will control that express agreement of the party; and by the same reason equity will let a man loose from his agreement, and will against his agreement admit him to redeem a mortgage.

A mortgage cannot be a mortgage of one side only.

3dly. It is another standing rule, that a mortgage cannot be a mortgage of one side only: (1) and here it is plain, Mr. *Harris* may make it a mortgage; for he has a covenant for the repayment of his mortgage-money. And for precedents was cited the case of *Kilvington* versus *Gardiner*, who was to redeem at any time in his life-time; and Sir *Robert Jason's* Case.

For the defendant it was insisted, that this express agreement of the parties ought to be pursued; and they pretended the same was made upon good consideration, *viz.* that the defendant *Harris* had formerly purchased these very lands from Sir *Robert Howard*, father of the plaintiff's husband, who pretended himself to be seized in fee; but this land was afterwards evicted, upon pretence that Sir *Robert* was only tenant for life; and the reason of this special clause of redemption was, that in case Mr. *Howard* should have issue male, the estate might remain in the family; but if he had none, it should be left to the defendant, as something towards

(1) Vide *Exton* v. *Greaves*, ante 139. Yet a mortgage is not in all cases completely mutual, *Talbot* v. *Braddill*, post 395.

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a compensation for the loss in his purchase, and Mr. *Harris* was to submit to the loss, and not to question Mr. *Howard's* title. But as to this they had not a word of it in proof, saving only, that the defendant had made such a purchase; but not that this was the consideration of the agreement: and it likewise appeared, that Mr. *Howard* claimed by an ancient settlement from the Lord *Suffolk*, and not by any settlement made by his father Sir *Robert*.

Then it was insisted, that this additional jointure was voluntary, and the plaintiff ought not to take the estate out of the hands of a purchaser. But it was answered, he was a purchaser for no more than his mortgage-money; and one that comes in by a voluntary conveyance may redeem a mortgage: and if the additional jointure was voluntary, so likewise was the agreement, that none but Mr. *Howard* or the heirs males of his body should redeem; and that was subsequent to the additional jointure.

One that claims under a voluntary conveyance may redeem a mortgage.

And it was further urged, that the mortgaged estate is a reversion after lives only, and is at present but 7*l. per ann.* and that Mr. *Harris* did actually borrow the mortgage-money to lend on this reversion; and it could not be presumed he would have so done, unless it had been in consideration, that this mortgage had been made in a special manner redeemable.

But it was answered, that possibly the defendant might design such a catching bargain of this mortgage; but that was a sort of circumvention, and the worst part of the case.

Vid. Case of Newcomb *v.* Bonham, *ante Case* 6.

After long debate, the *Lord Keeper* decreed, the mortgage should be redeemed; the rather for that the defendant had a covenant for repayment of his mortgage-moneys; but said, if the case had been, that a man had borrowed money of his brother, and had agreed to make him a mortgage, and that if he had no issue male, his brother should have the land; such an agreement made out by proof might well be decreed in equity.

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But then for the defendant the mortgagee it was insisted, that this mortgage having been made ten years since, and of a reversion, where 7*l. per ann.* rent was only reserved; that in this case the defendant ought to have interest upon interest, otherwise he would be a great loser in this case.

But as to that, it was answered, that the plaintiff's bill to redeem was filed so long since as 1677, and that the defendant had by answer opposed the redemption; and therefore from that time he had no pretence to an allowance of interest

HOWARD v. HARRIS.

for his damages: and it was never known in this court, that interest upon interest was at any time allowed in any case.

But the *Lord Keeper* was clear of opinion, that as to so much interest as was reserved in the body of the deed, that should be reckoned principal; (1) for it being ascertained by the deed, an action of debt would lie for it; and therefore it was reasonable that there should be damages given for the non-payment of that money. (2) And whereas it was urged, that this had never been practised, and that there was not any such precedent in the court; and that if this were to be established for a rule, every scrivener would reserve all his interest half-yearly, from time to time, as long as the money should be continued out upon the security: which would be to change the law and practice in this court, and make all mortgagors pay interest upon interest.

Where there was a great arrear of interest due on a mortgage, interest allowed for the interest reserved in the body of the deed.

But the *Lord Keeper* said, he was clear in that distinction between debt and damages; and he saw no inconvenience that could ensue: it would serve only to quicken men to pay their just debts; and accordingly decreed, that after a deduction of the yearly rents of the mortgaged premises out of the 60*l.* a-year payable for the interest, the defendant should be allowed interest for the residue of the said 60*l.* a-year, for which the defendant might have sued at law and recovered damages. (3)

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(1) *Quære* as to the practice of the court in this particular? Vide *Thornhill* v. *Evans*, 2 Atk. 330. The court will have regard in relieving as to interest, (where a less rate reserved upon due payment than first stipulated) to the length of the arrear, *Brown* v. *Barkham*, 1 P. Wms. 653. Et vide Earl of *Macclesfield* v. *Fitton*, ante 169, and cases cited in not. there.

(2) But where the mortgagor signed an account whereby so much is admitted to be due for interest, this will not carry interest unless the mortgagor by any letter or writing under his hand agrees to make it principal, *Brown* v. *Barkham*, 1 P. Wms. 653. And per Lord Chancellor *Parker*, "I conceive "to make interest on a mortgage prin- "cipal there should be a writing signed "by the parties," ibid. And an agreement made at the time of the mortgage will not do, but it is requisite that interest should be first grown due, before agreement concerning it can make it principal, Lord *Ossulston* v. Lord *Yarmouth*, Salk. 449. Et vide *Broadway* v. *Morecraft*, Mosely 247. And Sir *Thomas Miers's* Case, before Lord *Harcourt*, mentioned in *Bosanquet* v. *Dashwood*, Forr. 40. Powell's Law of Mortgages, 988, et seq. et vide *East India Company* v. *Atkyns*, Comyns 349.

(3) Reg. Lib. 1683. A. fol. 855.

Case 192.
Eodem die.
In Court.
Lord Keeper.

LYFORD *versus* COWARD.

Eq. Ca. Ab. 306, pl. 2. S. P. 2 Ch. Ca. 150. S. C.

Whether after 40 years possession of a copyhold under a will a surrender to the use of the will shall not be presumed.

THE plaintiff having enjoyed a copyhold for 40 years under a will, and having been admitted at the next court after the will made, came here to be relieved, and to have the defect of a surrender to the use of the will supplied, such surrender not being now to be found; as also the defendant having brought a writ of *Ayle* in the Court *Baron*, it was suggested in the bill, that a Court *Baron* was not proper, by reason of the difficulty, for the trial of such an action.

For the plaintiff it was said, it was a plain equity, that after forty years enjoyment, the defect of the surrender should be supplied, and cited the case of *Griffith* and *Lloyd*.

The *Lord Keeper* was clear, that the want of a surrender should be supplied; surrenders being kept by the Lord and his Stewards, who are oftentimes changed, and not so careful as they should be; and therefore a surrender might be lost without the default or negligence of the party; and he was about to have decreed the land to the plaintiff. But it being urged by the defendant's counsel, that in this case they contested even the will itself, as well as the surrender; and as to the enjoyment, the defendant was an infant eighteen years of the forty, and they conceived the length of time ought not to be any bar to the defendant's right in this case; for that by the *stat.* of Limit. in a writ of *Ayle* the plaintiff may declare of seisin in his ancestor at any time within fifty years.

32 H. 8.

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Whereupon *Lord Keeper* decreed, the defendant should admit a surrender, and directed an issue, *will or no will;* but the defendant's counsel insisting that the pretended testator was also *non compos* (which as was said ought to be pleaded specially) they desired, *compos vel non*, might be the second issue. At last it was agreed, it should be tried in an ejectment, where the whole matter might come in evidence, and the plaintiff was not to insist on his long possession. (1)

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(1) Reg. Lib. 1683. B. fol. 150. It appears that an order was afterwards obtained by the plaintiff that if the trial was not had at or by the time therein mentioned, it should be taken as tried, and adjudged against the defendants, unless cause: no cause was shewn and no trial had, and the cause coming on again on the equity reserved no counsel appeared for the defendants,

In this case were cited the following cases, *viz. Biden* versus *Loveday*, 14 *Junii*, 11 *Car. I.* where lessee had been twenty-five years in possession, and the lessor would have avoided the lease for want of livery, this court presumed livery, and decreed the lessee should hold out during the continuance of his lease, though after long possession courts at law will presume livery. *Pencose* versus *Trelawney*, 2 *Julii*, 35 *Car. II.* where in regard the plaintiff had forty years possession of a *Piscary*, the court decreed the defendants to surrender and release their title to the same, though the surrender made by the defendant's ancestors was defective, and that the plaintiffs should hold and enjoy against the defendants.

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and a decree was made for the plaintiffs, and a perpetual injunction awarded, Reg. Lib. 1683. B. fol. 642. Vide also as to presumption of right on long enjoyment, *Finch* v. *Resbridger*, post 2 vol. 390.

RATCLIFFE *versus* GRAVES & Al'.

Case 193.

7 Novembris. In Court. Lord Keeper.

Eq. Ca. Ab. 93, pl. 3. S. C. 2 Ch. Ca. 152.

A surety not chargeable in equity further than he can be by law.

WALTER RATCLIFFE, plaintiff's father, having made his will, and plaintiff and his brother *John* executors and residuary legatees, and they being infants at their father's death, administration with the will annexed during their minority was granted to *Eliz. Ratcliffe* their mother; and the *Prerogative* Court upon granting the said administration took the usual bond from the administratrix, in which the two defendants, the *Heathers*, were bound, as her sureties.

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The plaintiff's brother being dead, and having made his will and plaintiff executor, he now brought his bill for an account of the testator's personal estate, and as to the defendants the sureties, it was suggested, that by *fraud* and *covin* they had got up their said bond, and had procured insufficient security to be accepted by the *Prerogative* Court in the room thereof.

But the *Lord Keeper* upon the first opening of the matter declared, he would not charge the sureties further, than they were answerable at law; and dimissed the bill as to that part. (1)

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(1) But where bond signed and sealed by *A.* as surety, but the name by mistake not inserted, and security being demanded *A.* on fresh agrees, but

RATCLIFFE v. GRAVES.

Another part of the case was, that the said administratrix having had the intestate's estate long in her hands, and employed the same in trade, and received interest for some part thereof, it was prayed, that she might answer interest for it.

The *Lord Keeper* was clear of opinion, that she ought to answer interest for it; for he thought it reasonable, that executors in all cases should answer interest, if they had used the money in trade, or received any interest for it, and not turn the same to their own private advantage: the only objection against it was, that if the money should miscarry, or be lost, the executor must stand to the loss of it: but now every one knows a man may insure his money for *one per cent.* and therefore decreed, the administratrix should account for interest, unless she made oath, that she had kept the money by her: (1) although it was urged, that the constant practice of the court had been otherwise for twenty years past, and more; and that there were above forty precedents in the case; and the cases of *Haslewood* and *Baldwin*, and *Gardener* and *Cartwright* were cited, in which last case it was fully in proof, that the executor had received interest, and therefore it was decreed, that he should account for such interest as he had received; but this decree was afterwards reversed upon an appeal to the *House of Lords.*(2)

Executor shall answer interest, if he has made any of the testator's estate.

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afterwards finding the mistake refused, equity will compel him, *Crosby* v. *Middleton*, Hil. 1710. Pre. Ch. 309. So where bond is extinguished at law this court will, under circumstances, set it up against the surety, *Skip* v. *Huey*, 3 Atk. Rep. 93.

(1) A distinction was formerly taken between a solvent and insolvent executor or trustee, at the time of laying out the money, if the former made any advantage of the trust money, laying it out in a speculation, he was to have it for himself, on the ground that he ran a risk of loss; if the latter made any advantage then the *cestui que* trust should have it as by reason of the insolvency of the executor or trustee at the time he the trustee was unable to risk any loss, *Bromfield* v. *Wytherby*, Pre. Chan. 505, but this case was denied in *Corsellis* v. *Lake*, 28th July, 1756, and quite the contrary doctrine to this is now held, for it is the principle of the court that if in any case executor or trustee make any advantage of the trust money the *cestui que* trust shall have it, and if they incur any loss by undue management or wilful neglect, they must answer for it to *cestui que* trust, *Lowson* v. *Copeland*, 2 Bro. Ch. Rep. 156. *Powell* v. *Evans*, 5 Ves. 839. *Hill* v. *Simpson*, 7 Ves. 152. [*Heathcote* v. *Hulme*, 1 J. & W. 122, and Cases there cited.] So executors charged with interest on balances in their hands, *Longmore* v. *Broom*, 7 Ves. 124. As to distinction between executors and trustees vide Mr. Cox's note to *Fellowes* v. *Mitchell* and *Owen*, 1 P. Wms. 81. [*Churchill* v. *Hobson*, 1 P. Wms. 241. *Westley* v. *Clarke*, 1 Eden, 357, and cases there collected.]

(2) Sed vide the report of this case of *Gardener* and *Cartwright*, 2 Ch. Ca.

But notwithstanding these *precedents* it was decreed *prout supra.* (1)

21, nom. *Grosvenor* v. *Cartwright*, by which it appears, that interest was not decreed, and that decree was affirmed in the Lords, 2 Ch. Ca. 152.

(1) The principle upon which this doctrine is founded is recognized in *Ekins* v. *East India Company*, 1 P. Wms. 396. *Treves* v. *Townshend*, 1 Br. Ch. Rep. 384, and the doctrine itself is now established by a great number of cases, *Newton* v. *Bennett*, 1 Bro. Ch. Rep. 359. *Perkins* v. *Baynton*, ibid. 375. Interest at the rate of 4*l. per cent.* but court will order trustee to pay interest at 5*l. per cent.* though testator had kept it in his hands at 4*l.* on circumstances, *Forbes* v. *Ross*, 2 Bro. Ch. Rep. 430. *Foster* v. *Foster*, ibid. 616. *Littlehales* v. *Gascoigne*, 3 Bro. Ch. Rep. 73. *Franklin* v. *Firth*, ibid. 433. In bankruptcy of *Hilliard*, 1 Ves. jun. 90. *Young* v. *Combe*, 4 Ves. 104. So executor shall be answerable for any gain obtained by keeping the money in his hands, *Piety* v. *Stace*, 4 Ves. 620, et vide *Palmer* v. *Jones*, ante p. 144, and cases cited in not. there. [*Heathcote* v. *Hulme*, ub. sup.]

CHARLES WEST, Esq. *versus* LORD DELAWARE and Sir JOHN CUTLER.

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Case 194.

10 *Novembris.*

In Court.

Lord Keeper.

2 Vent. 357.

A father on the marriage of his son articles to settle a jointure on the wife, and her issue, but no provision is made for the son.

The father has the portion, and the wife dies without issue.

Whether the son is entitled to any estate in the lands.

THE plaintiff being the son and heir of the defendant the Lord *Delaware;* there were articles made on the marriage of the plaintiff with one Mrs. *Huddleston;* whereby the Lord *Delaware*, in consideration of 10,000*l.* portion to be paid or secured unto him by Mr. *Huddleston*, covenants with Mr. *Huddleston* to settle on his daughter 800*l. per ann.* for her present maintenance and jointure, and 400*l. per ann.* more after the death of his lordship's mother, remainder to her issue, and that after his decease he would make up the 1,200*l. per annum*, 3,000*l. per ann.* and that was to be settled on her issue, and there was a clause in the articles, that Mr. *West* should have power to sell 100*l. per ann.* of the premises.

Mrs. *Huddleston* dies after marriage without issue, before the portion paid, or any settlement made. Afterwards the Lord *Delaware* has a decree for the *ten thousand pounds* portion, but by compromise accepts of 6,000*l.* which his lordship receives, but refuses to make any settlement on his son.

The bill was to be relieved touching these articles, and to have an execution of them according to the meaning of the parties and an equitable construction.

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For the plaintiff it was insisted, that although by the letter of the articles there is no agreement for settling any estate upon the son, yet it is strongly implied; and the intent of the parties cannot be presumed to be otherwise: and if these articles had been carried to any lawyer to have drawn a settlement in pursuance of them, no one will say, but they would have limited an estate for life to Mr. *West*.

1*st*. It was urged, that the word *junctura*, jointure, *ex vi termini*, implies an estate for life to the husband. (1)

2*dly*. That the portion was a consideration moving from Mr. *West*, and such consideration as would make him a purchaser.

3*dly*. That it would be a most unnatural exposition of the articles, to say the whole estate should be limited to the wife, and nothing to the son, and thereby to make the son beholden to his wife for maintenance out of his own estate.

4*thly*. That it is impossible to draw a conveyance exactly pursuant to the letter of the articles, for in case the Lord *Delaware* had died in the life-time of Mr. *West* his son, the contingent remainders to the issue had been destroyed.

But for the Lord *Delaware* it was insisted, and so he had sworn in his answer, that the articles were made according to the agreement, and that they were so penned on purpose, that if his son's wife should die without issue, the estate might revert to him again, and he might have his son in his power, as to a second match.

After long debate the *Lord Keeper* told them, that each of them were unreasonable, and held too fast; that on one side it was too much to ask all the estate; for that the Lord *Delaware* had but 6,000*l*. of the portion: and on the other hand it was too hard for the Lord *Delaware* to refuse to make any settlement at all: but he advised them to end the matter by compromise, and proposed it should stand referred to the *Attorney-General* and Sir *Francis Pemberton*.

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(1) Vide stat. 27 Hen. VIII. cap. 10. Where *A*. in performance of a covenant of marriage to be had between his son and *B*. made a feoffment to the use of *B*. for her life, for her jointure, and after they intermarried it was a jointure within the statute of Hen. VIII. *Vernon's* Case, Co. Rep. 4. p. 2, 3. *Ashton's* Case, Dyer 228. cit. there, 1 Inst. 36 b. Vide also *Butler* and *Baker's* Case, Co. Rep. 3. p. 27. Jacob. Dict. verb. jointure.

Case 195.

GOODWIN *versus* RAMSDEN. (1)

13 *Novembris. In Court. Lord Keeper.*

Eq.Ca.Ab. 161, pl. 4. S. C.

A man dies intestate within the province of *York*, all his children being advanced in his lifetime. His personal estate shall be distributed according to the statute of Distributions.

THE plaintiff's bill was to have an account, and her share of her father's personal estate, who died intestate.

The defendant pleaded, that the estate in question lay within the province of *York*, and that the intestate died there, and that the plaintiff, being one of his daughters, was advanced by him in his lifetime; and that by the custom of the province of *York*, a daughter, being once advanced by her father in his lifetime, was excluded from all further benefit of her father's personal estate.

But in this case, it appearing that all the children of the intestate were advanced by him in his lifetime, and so the estate wholly exempted out of the custom of the province of *York*, it ought to go now in a course of administration, and be distributed according to the act for settling intestates' estates; and thereupon the plea was over-ruled. (2)

(1) Cited in *Stapleton* v. *Sherrard*, post 305. by the name of *Ramsden* v. *Gudgeon*, post 2 vol. 274. S. C.

(2) But the benefit of the plea was saved to the hearing, and in case plaintiff did not prevail he was to pay defendant his costs, Reg. Lib. 1683. A. fol. 44. Vide *Stapleton* v. *Sherrard*, post 315.

Case 196.

DAY and Ux' *versus* CHATFIELD.

Eodem die. In Court. Lord Keeper.

If an executor dies before probate of the will, his executor cannot prove it; but administration *cum testamento*, &c. must be granted to the residuary legatee, (if any) or to the next of kin.

WHERE an executor dies before probate of a will, his executor cannot take upon him to prove that will, but administration ought to be granted with the will annexed to the residuary legatee, if there be any, or else to the next of kin, according to the resolution in *Isted's* case, in *Dyer*, fol. 372. (1)

(1) Reg. Lib. 1683. A. fol. 314. But the above point does not appear there. The case there stated is as follows: *William Banks* made his will, and thereof appointed his daughter *Mary* sole executrix and residuary legatee, *Mary* proved the will, but her mother (she being young) took upon

herself the management and receipt of the said testator's effects, *Mary* then married one *Samuel Bailey*, and afterwards died, leaving *Bailey* and her mother surviving, afterwards *Bailey* and an aunt of the plaintiff by a writing under their hands and seals, consented and agreed that administration of the effects of *Mary* should be granted to plaintiff's wife, which was granted accordingly; the mother of *Mary* then took out administration of the effects of *William Banks*, the original testator, left unadministered by *Mary*, with the will annexed, and then appoints the defendant her executor and dies. The bill was for an injunction and account; to this bill the defendant put in a plea which is not stated, but which was overruled. And an account decreed with costs, *nisi*, and before defendant should be admitted to shew cause against costs, he was to pay to plaintiff 5 marks for that day's attendance, vide *Wankford* v. *Wankford*, *Salk.* 303., where said that the case in *Dyer* was the first case of that nature.

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MOORE *versus* HART.

Case 197. 14 *Novembris. In Court. Lord Keeper. Ante Case* 100.

THE bill was to have an execution of a marriage agreement, setting forth, that the defendant had made great application to the plaintiff's friends and relations, that the plaintiff might become a suitor to his daughter, and at first promised to give his daughter 3,000*l.*; but the defendant afterwards finding the plaintiff's affection settled upon his daughter, receded from his promise, and then pretended he could not give her so much; and thereupon on the 6th of *Jan.* 1680, a letter was wrote by one Mr. *Reeve*, a relation of the plaintiff's, to the defendant *Hart*, desiring him to be plain, what he would give down with his daughter. In answer to which letter the defendant on the 10th of the same month wrote to Mr. *Reeve*, acknowledging the deserts of the plaintiff beyond the defendant's ability, and adds further, you desire me to be clear, and say what I will lay down upon the nail; to which, if you mean in ready money, my estate lying in land, I can say but little; but if it be to say, what I will give my daughter at the present, I say with all plainness 1,500*l.* in land, either at *Creaton* or *Wapnam*: but if our difference in the value of the land will make money more acceptable, I will give the same sum in money out of the moneys to be raised by sale of *Creaton*, &c. And further setting forth, that in confidence of this promise and agreement, the plaintiff married the defendant's daughter, whereby she would be intitled to dower, the plaintiff's estate being 500*l. per ann.* in possession, and as much more in reversion; and therefore to have the said promise made good, and the

land stand charged with the 1,500*l.* portion, according to the agreement, was the bill.

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The defendant *Hart* had formerly pleaded the statute of *Frauds* and *Perjuries*, but that was over-ruled by Mr. Justice *Charlton*; and the defendant now by answer insisted on the benefit of that act of parliament, and further set forth that after his letter of the 10th of *Jan.* Mr. *Reeve* wrote another letter to him to this effect, *viz.* that since the defendant resolved not to be obliged to give 500*l.* more at his death, (1) he left the defendant and the affair as he found it, &c. And the defendant said further, that he looked upon this letter to be an absolute waiver of the treaty, and did not answer it, or after that time treat further with Mr. *Reeve* or any other touching the marriage; but renewed a former treaty concerning his daughter's marriage with one Mr. *Hart*, who had 6 or 700*l. per ann.* and offered to settle 200*l. per ann.* on her: but that before his daughter returned home from Mr. *Reeve's* house, where she had been, the marriage with the plaintiff was had, without the defendant's consent or privity; and insisted that all former proposals were absolutely waived by Mr. *Reeve's* last letter; and that if the plaintiff had any demands against the defendant, he ought to take his remedy at law; and denied he ever treated about the said marriage, or made any promise concerning the marriage portion, after that last letter of Mr. *Reeve's*; and insisted he ought not to be charged.

But it being fully in proof, that the defendant *Hart*, upon the receipt of Mr. *Reeve's* last letter, came up to town purposely about this match, and declared before several witnesses not above two days before this marriage, that he would make his promise good upon the word of a *priest*, and under bitter imprecations, that if he did not do it, he and his posterity might perish, &c. And Mr. *Reeve* likewise deposing, that he never communicated his last letter to the plaintiff, but that the same was wrote without his privity or knowledge, the court decreed the defendant to pay the plaintiff the 1,500*l.* portion, (2) and that the lands at *Creaton* and *Wapnam* should stand charged with the payment of it; (3)

(1) The defendant said in his letter he would give the plaintiff's wife 500*l.* at the time of his death if she had issue. R. L.

(2) Together with interest, which it was referred to the Master to compute from the time of the marriage. R. L.

(3) And if the estates should not be of that value, then the defendant to make good the deficiency. R. L.

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and that the plaintiff should settle (1) 300*l. per ann.* jointure *on his wife: though for the defendant it was urged, that this promise in writing being discharged by a subsequent letter in writing, it could not now be revived by parol discourses.

It was also objected, that the plaintiff had good remedy at law: but it was answered, he was proper in equity to charge the lands with the money by virtue of the agreement. (2)

(1) 200*l.* R. L.

(2) Reg. Lib. 1683. B. fol. 60. Vide ante 110. S. C. and cases there cited. *Cokes* v. *Mascal*, post 2 vol. 34, 200. *Wenkford* v. *Fottherly*, ibid. 322.

Case 198. COMES RANELAGH *versus* THORNEHILL.

17 *Novembris. In Court. Lord Keeper.*

Eq. Ca. Ab. 75, (C) pl. 2. 2 Ch. Ca. 153. S.C.

A bill may be brought for solicitor's fees only, if for business done in this court. And so it may, where the business is done in another court, if it relates to another demand made by plaintiff in this court.

IN a bill of review it was assigned for error, that the defendant, who was a solicitor, had a decree for his fees, for which he ought to sue at law. *Sed non allocatur*. A man may have a bill for solicitor's fees only, if for business done in this court: and so he may, where the business is done in another court, if it relates to another demand, the plaintiff makes in this court. (1)

(1) Vide stat. 2 Geo. II. cap. 23, sect. 23. *Parry* v. *Owen*, Amb. 109. *Barker* v. *Dacie*, 6 Ves. 681, where the practice of the court in this particular, and the cases are fully considered.

Case 199. CARPENTER *versus* BENNET.

Eodem die. In Court.

A man indebted 700*l.* agrees on his marriage to settle lands of 100*l.* a-year on himself for life, then to the wife for her jointure, remainder in tail upon their issue. Decreed the land to be sold to pay the 700*l.* and the surplus of the money to be laid out and settled on the wife and the issue. But this decree reversed on a bill of review.

A MAN upon his marriage having agreed to settle his lands, being 100*l. per annum*, upon himself for life, remainder on his wife for her jointure, the remainder in tail upon their issue: and it appearing in the cause that the husband had then contracted a debt of 700*l.* It was decreed the land

should be sold, the husband's debt be first paid, and the residue of the money laid out in a purchase of lands to be settled on the wife and her children. CARPENTER v. BENNET.

And a bill of review being brought to reverse this decree, it was assigned for error, that the husband had not a sufficient allowance made him for his interest in the premises, and that this being all his estate, he ought in equity to have had some provision made him out of the estate, which was decreed to be purchased, for his maintenance.

And for these reasons the *Lord Keeper* reversed the decree, saying, it was hard to compel a man to sell his estate for life for seven years purchase: and it was likewise hard the wife should not allow her husband maintenance. (1) [204]

(1) In this case there was a demurrer which was over-ruled, but without costs. Reg. Lib. 1683. A. fol. 48.

HINCKS *versus* NELTHORPE. Case 200.

THE bill was to establish an agreement (1) for a separate maintenance for the defendant's wife. And (amongst other things) prayed a discovery of several unkindnesses and hardships which the defendant, as it was pretended, had used towards his wife to make her recede from this agreement. To which discovery the defendant demurred, for that it was not a matter properly examinable or relievable in this court; and the demurrer was allowed. (2)

Eq. Ca. Ab. 40, pl. 5. 77, pl. 11. S. C.

Bill to establish an agreement for a separate maintenance. To such part as prayed a discovery of hard usage, defendant demurred.

Demurrer allowed.

(1) Made before the marriage. R. L.

(2) There was also a plea of the statute of Frauds to that part of the bill that related to the agreement, which was over-ruled, but the benefit thereof saved to the hearing. No further account of the cause appears. Reg. Lib. 1683. A. fol. 38. vide *Page* v. *Neale*, ante 108, and cases cited in not. there.

Case 201. LADY POULET *versus* LORD POULET. (I)

24 Novembris. In Court. Lord Keeper.

Eq. Ca. Ab. 267, pl. 1. 2 Ch. Rep. 286. 2 Vent. 366.

Term limited by a settlement to raise portions for younger children payable at twenty-one or marriage. One of them dies under twenty-one and unmarried. Her portion shall not be raised for the benefit of the administratrix.—Otherwise, if the portion was to be raised out of a personal estate.

THE Lord *Poulet*, the defendant's father, by settlement limited a term to trustees for the raising of 4,000*l.* a-piece for his younger children for their portions, to be paid them at their respective marriages or ages of one and twenty years, which should first happen; and for paying unto them 100*l.* *per annum* maintenance in the mean time; and after these portions and maintenance raised, then the residue of the term was to be in trust for his heir the defendant.

The said Lord *Poulet* having two daughters by the plaintiff his second wife, *viz.* *Vere* and *Susanna*, makes his will, and thereby gives to his said daughters 4,000*l.* a-piece for their respective portions, to be raised and paid them in such manner as by the said settlement is directed; but declares, they should have but one 4,000*l.* a-piece, and not two
[205] by the settlement and will, unless the defendant his son should die without issue; in which case he devised, that they should have 2,000*l.* a-piece more, to be paid in the same manner as the 4,000*l.*

Vere, one of the daughters, died being about eight years of age. The Lady *Poulet*, the mother, takes letters of administration to her daughter *Vere*, and exhibits a bill against the trustees and the Lord *Poulet* the heir at law, to have her said daughter's portion of 4,000*l.* raised and paid.

In this case the question was, whether the 4,000*l.* portion of Mrs. *Vere Poulet* the daughter did cease by her death, or should be raised for the benefit of her administratrix. (2)

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(1) Cited as a leading case in *King* v. *Withers*, Forr. 122.

(2) Vide *Yates* v. *Fettiplace*, post 2 vol. 416. Pre Chan. 140. S. C. Where devise of portion out of land to be paid at twenty-one, or marriage, daughter dies under twenty-one and unmarried, the portion shall sink for the benefit of the heir, and that whether *hæres natus* or *hæres factus*. So *Brewin* v. *Brewin*, Pre. Ch. 196. But maintenance allowed and charged on the land, ibid. *Tournay* v. *Tournay*, ibid. 291. *Jennings* v. *Looks*, 2 P. Wms. 276. So no diversity where portion charged by will, and where by deed. *Smith* v. *Smith*, post 2 vol. 92, said to be governed by the principal case. *Duke of Chandos* v. *Talbot*, 2 P. Wms. 610, 613. And vide the exceptions to the above rule, and the cases on the subject cited and classed by Mr. *Cox*, in not. (1) to the case of *Duke of Chandos* v. *Talbot*. And where a be-

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Lord Keeper said, this was a very hard demand in equity; for a jointress, who had already the provision intended her on her marriage, and was before a stranger in the family, to go away with this 4,000*l.* and neither the heir nor younger children benefited by it, she being not to make any distribution.

If the 4,000*l.* had been to have been raised out of the personal estate, it had been clear, the plaintiff must have had it; (1) but being here a charge upon the estate of the heir, he would consider of the case, and advise him with the Judges about it.

Note.—This bill was dismissed 13th *May*, 1685, and afterwards upon an appeal to the *House of Lords* the decree of dismission was affirmed.

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quest of residue to children, but not to be claimed till twenty-two, the children in the mean time to be educated with the interest, such interest was held vested, *Dodson* v. *Hay*, 3 Bro. Ch. Rep. 404. Et vide further as to the vesting of legacies, *Robinson* v. *Fitzherbert*, 2 Bro. Ch. Rep. 127. *Hoath* v. *Hoath*, 2 Bro. Ch. Rep. 3. Where held as settled, that giving the interest of a legacy vests it. [So *Leake* v. *Robinson*, 2 Mer. 386. *Jones* v. *Mackilwain*, 1 Russell, 224.] And no difference when given for maintenance, *Robinson* v. *Fitzherbert*, ibid. 127. *Walcot* v. *Hall*, ibid. 305. Where said per *Master of the Rolls*, the legacy, though vested by giving the interest, yet liable to be divested if legatee died before twenty-one. *Sed quære*, *Hutchin* v. *Mannington*, 1 Ves. jun. 366. And in not. in *Stapleton* v. *Palmer*, 4 Bro. Ch. Rep. 191. But in *Pulsford* v. *Hunter*, 3 Bro. Ch. Rep. 416, merely giving a maintenance till legacy payable does not vest as in the case of interest. *Cricket* v. *Dolby*, 3 Ves. 13. *Perry* v. *Woods*, ibid. 304. *Wadly* v. *North*, ibid. 364. *Mackell* v. *Winter*, ibid. 556. *Booth* v. *Booth*, 4 Ves. 399, 409. *Corbyn* v. *French*, ibid. 418. *Reeves* v. *Brymer*, ibid. 692. *Middleton* v. *Messenger*, 5 Ves. 136. *Harrison* v. *Foreman*, ibid. 207. *Holloway* v. *Holloway*, ibid. 399. *Barton* v. *Cook*, ibid. 461, 463. *Bolger* v. *Mackell*, ibid. 509. *Godfrey* v. *Davis*, 6 Ves. 43. *Gaskell* v. *Harman*, ibid. 159. *Hanson* v. *Graham*, ibid. 239. *Daniel* v. *Daniel*, ibid. 297. *Weddell* v. *Mundy*, ibid. 341. *Brown* v. *Bigg*, 7 Ves. 279. *Branstrom* v. *Wilkinson*, ibid. 421. *Bell* v. *Phyn*, ibid. 453. *Wilmot* v. *Wilmot*, 8 Ves. 10. *Cambridge* v. *Rous*, ibid. 12. *Paul* v. *Compton*, ibid. 375, 380. *Elwin* v. *Elwin*, ibid. 546. *Bayley* v. *Bishop*, 9 Ves. 6. *Deane* v. *Test*, ibid. 151. *Lane* v. *Goudge*, ibid. 225, in which the construction of words, apparently of condition, is considered. *Smithser* v. *Wilcock*, ibid. 233. *King* v. *Hake*, ibid. 438. *Balmain* v. *Shore*, ibid. 500, 508.

(1) So *Jennings* v. *Looks*, 2 P. Wms. 278. But where the portion being out of land is become payable, and the child die but the portion not paid, because land not sold, it shall be paid to the personal representative, *Bartholomew* v. *Meredith*, post 276. And note, the essential difference between the principal case and that of Lord *Rivers* v. Lord *Derby*, post 2 vol. 72. (*quod vide*) seems to be that here a time of payment was limited, viz. twenty-one or marriage, but in the other case no time being mentioned, it was considered as vesting immediately, and consequently that it should go to the personal representative.

Case 202.

COLEBY *versus* SMITH.

6 Decembris. In Court. Lord Keeper.

Articles and a conveyance and fine in pursuance thereof, set aside for fraud.

THE bill was brought by *Coleby* the plaintiff to be relieved against a purchase made by the defendant *Smith* and *Al'* from the plaintiff's father, suggesting that he had been circumvented and imposed upon by the defendants. (1)

[206] The defendants insisted on their purchase; and in this case it appeared, that there were at first articles for the purchase under hand and seal, and some time after that a conveyance actually made and executed in pursuance of these articles, and the purchase money was all paid or secured; and after all this a fine levied by *Coleby* the father to the purchaser,(2) and *Coleby* writes a letter to his tenants to attorne: and because *Coleby* the son, the now plaintiff, showed himself discontented at this purchase, and would have obstructed it, *Coleby* the father takes a release from his son of all his right to these lands; which release was proved to be so taken with an intent to establish this purchase.

Upon the hearing of this cause the *Lord Keeper* set this purchase aside, because there appeared to be some art used to persuade *Coleby* the father to sell these lands, *viz.*—They persuaded him (he being almost in his dotage) that they could help him to a great match, and told him, that to qualify himself for the lady, it was necessary he should convert all his land into money; which shewed the man was purely imposed upon; for here he sells his land, when he does not want money, and sells it to those, who had no money to buy, but were to borrow; and he is to receive his money by instalments; and when the whole is received, it is much less than the real value, and the defendants in a very little time might have paid the purchase-money out of the profits: and besides, the defendants never own to him, that they were to be the purchasers, but drive on the bargain in one Mr. *Ewre's* name, and a letter is wrote by one of the confederates, as from Mr. *Ewre*, that he must resolve quickly what he would do: and that Mr. *Ewre* would admit of no

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(1) The purchase as stated in the bill was of an estate worth 400*l. per ann.* for 4,300*l.* payable by instalments in seven years. R. L.

(2) Vide *Attorney-General* v. *Vernon*, post 390.

longer delay in the matter, &c. And for these reasons the *Lord Keeper* set aside this purchase.

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Though *note*, it was proved, that *Coleby* the father was a sensible man and capable of managing his own business, and had not any apparent weakness upon him; and that he was absolute owner of this estate, and might have given it away: and it was likewise proved, that after he had conveyed away the land, he declared if it were then to do, he would do it again. (1)

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(1) It likewise appeared that *Coleby*, the father, received several of the instalments, and two bonds for the remainder, and three years after the purchase levied a fine of the premises to the defendants. The defendants, by their answer, expressly denied all the circumstances of imposition and restraint charged by the bill. By the decree the plaintiff was to repay the defendants all moneys paid by them, on account of the purchase, together with interest thereon, from the respective times of payment, they accounting to plaintiff for the profits they had received of the estate, Reg. Lib. 1683. A. fol. 161. For the cases on the doctrine of frauds, as recognised in courts of equity, vide *Jarvis* v. *Duke*, ante p. 20. Et vide *Wharton* v. *May*, 5 Ves. 27., where on the ground of fraud a general account was decreed, and the securities to stand only for the balance, though the vouchers had been destroyed by general consent: so the jurisdiction assumed by courts of law will not prevent relief in equity, *Evans* v. *Bicknell*, 6 Ves. 182-3 The decree in the principal case was affirmed in the *House of Lords* on appeal, 18th Dec. 1685. Journ. Ho. Lords, vol. 14, p. 86.

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Case 203.

6 *Decembris. In Court. Lord Keeper.*

Eq. Ca. Ab. 15, pl. 2. 229, pl. 11. S. C.

Bailiffs, who had served an execution in breach of an injunction, find money hid in the house, and carry it away. Party, at whose suit the execution was taken out, ordered to make satisfaction.

THE defendants having taken out execution in breach of an injunction of this court, and some of the bailiffs, who served the execution, having, as was alleged, found out a place in a wall in the plaintiff's house, that was made up again with bricks, wherein was hid 150*l.* and having taken away the money, and done great spoil to the plaintiff's goods, an order was made by the late *Lord Chancellor*, that the defendants should make good this money to the plaintiff, and should satisfy all other damage which the plaintiff would swear he had sustained.

And now this matter came before the *Lord Keeper*, and the defendants complained of this order as unjust, and without precedent; the most that has been ever done in this

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court in any such case, was only to put the parties accused to purge themselves on oath; but here by this order the plaintiff was to be the judge of his own damage: and that the defendants came into possession by course of law, and the bailiffs were legal officers: (1) if they did any thing amiss, the party ought to take his remedy at law against them, and the plaintiff ought not to be answerable for their misdemeanours.

In *odium spoliatoris*, the oath of the injured party sufficient to charge the wrong doer.(2)

But the *Lord Keeper* held the order to be just; and he thought it an idle practice in the court to put a thief to his oath to accuse himself; for he that has stolen will not stick to forswear it; and therefore in *odium spoliatoris* the oath of the party injured should be a good charge upon him that has done the wrong: and confirmed the former order. (3)

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(1) Vide *Lady Dacres* v. *Chute*, ante 160. as to sequestrators.

(2) Vide *East India Company* v. *Evans*, post 308. *Dyer* v. *Tymewell*, post 2 vol. 123. where, in case of a gross fraud, the court gave costs, to be ascertained by the party's own oath. Sed vide *Plampin* v. *Betts*, post 272. where a decree whereby defendant was to be concluded by the plaintiff's own oath, was reversed.

(3) And the Master was to compute the amount of the loss sustained together with interest thereon, which was to be paid with costs, Reg. Lib. 1683. A. fol. 78.

Case 204.

POTTS *versus* POTTS.

Eodem die. In Court. Lord Keeper. Eq. Ca. Ab. 6, pl. 7. S.C.

ON exceptions to a Master's Report, which had reported the defendant's answer sufficient, the *Lord Keeper* declared, that it was sufficient for a servant or apprentice in answer to a bill for an account, to say in general, that whatever he received, was by him received and laid out again by his master's order. (1)

It is sufficient for a servant or apprentice to say in his answer in general, that what he received for his master was laid out again by his order. *Vid. ante Case* 81 & 127.

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(1) The exceptions allowed, Reg. Lib. 1683. B. fol. 154. Vide *East India Company* v. *Henchman*, 1 Ves. jun. 289.

Case 205.

The Case of ALDERMAN BACKWELL'S Creditors.

Vid. ante Case 142.

Commission of bankruptcy superseded by the consent of the petitioning creditors, refused to be revived upon the application of other creditors, who had not come in, but desired so to do.

Some of Alderman *Backwell's* creditors having upon a petition to the *Lord Keeper* obtained a commission of bankruptcy against him, the commissioners sat and found him a bankrupt, and made an assignment, and then Alderman *Backwell* dies in *Holland*. His son and heir agrees with all the creditors, who had petitioned for this commission, and thereupon obtains a *supersedeas;* afterwards the other creditors hearing of it, they petition the *Lord Keeper* to grant a *procedendo,* because a commission being once granted, and an assignment made, that was a trust for all the creditors of Alderman *Backwell,* that should come in within the *four* months, which they intended to do, and insisted that the commission could not be regularly discharged, till after the four months were past; and though it had been sometimes done in other cases, yet that was where the creditors might have the same benefit by a new commission; but in this case the bankrupt being dead, if this commission should stand superseded, the creditors were without remedy; and insisted this was a fraud and contrivance betwixt the heir and the other creditors to defeat them of their just debts, and ought not to be countenanced in equity: and that they relied upon it, that they might at any time within the *four* [209] months have come in, and have had the benefit of this commission, otherwise they themselves would have petitioned for a commission against him.

But the *Lord Keeper* declared, that in any case, where all the creditors that petitioned for a commission, would afterwards agree to have it discharged, he would never scruple to discharge that commission; (1) and in this case mentioned how inconvenient it would be to revive the commission; for Alderman *Backwell* had traded considerably since such time as the commissioners had found him a bankrupt, and that all the composition money that his son had paid to his father's creditors must be refunded, and that

(1) But where a majority of the creditors agree to certify that a commission ought to be superseded, yet the court, under circumstances, will stay the superseding of the commission to give a creditor who has not yet proved, an opportunity of proving his debt, *Ex parte Crispe,* 1 Atk. Rep. 135. Et vide *Bennet* v. *Gauday,* 1 Show. 202.

BACKWELL'S CREDITORS.

many other inconveniences would ensue; and that he had all along determined with himself not to revoke this *supersedeas*, but had deliberated upon it, that the other creditors might make the best terms they could with the heir, and when they have been fairly offered, if they stood in their own light, they must blame themselves for it: and declared he would not revoke the *supersedeas*, nor grant a *procedendo*.

Case 206.

15 *Decembris. In Court. Lord Keeper.*

An annuity is granted out of lands, and made redeemable on payment of a sum of money. The grantor cannot be foreclosed of the land, though he may of the redemption of the annuity.

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CARNESEW *versus* ARSCOTT.

ON a demurrer to a bill of review, the case was; the plaintiff had granted an annuity out of certain lands in *Cornwall* to the defendant, with a clause of distress and *nomine pœnæ*, and a power to enter and detain till he was satisfied all rent in arrear, and the *nomine pœnæ*. The annuitant exhibits a bill, suggesting that there was no distress to be found upon the land, but that it lay waste, and that if he should enter, he could make no profit thereof by reason the land was covered with some old incumbrances, and his stock would be swept away; (1) and the annuity being redeemable on payment of a sum of money, he prayed the defendant might be absolutely foreclosed, even of the land itself; and it was so decreed *ex parte* by the Lord Chancellor *Nottingham*.

And now it was assigned for error by the plaintiff, in the bill of review, that he ought not to be foreclosed of the land itself; but at most could be only foreclosed from redeeming the annuity; and that the *nomine pœnæ's* should run upon him; and of that opinion was the *Lord Keeper*, and therefore reversed the decree.

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(1) Where there is a clear right to a rent, but no remedy at law, as (*e. g.*) no demesne lands whereon to distrain, it seems a bill will lie in equity for relief, *Duke of Leeds* v. *Powell*, 1 Ves. 172.

Case 207.

15 *Decembris.*
In Court.
Lord Keeper.

HEIGHTER *versus* STURMAN.

Eq. Ca. Ab. 21, pl. 12. S. C.

Administratrix and her two children, intitled to a lease of a house, agreed by parol to make a lease thereof to *J. S.* The administratrix executes the lease. Upon a bill to compel the other two to join, they cannot plead the statute of *Frauds*, &c.

An administratrix and her two children being entitled to a lease of a house, they all three agree to make the plaintiff a lease for *ten* years at a certain rent. The administratrix with the privity of the other two having executed such lease; the bill was to compel the other two to execute the same likewise.

The defendants pleaded the statute of *Frauds* and *Perjuries;* the agreement made with them not being reduced into writing. (1)

But the *Lord Keeper* over-ruled the plea, and held that the administratrix having executed the lease, this case was out of the statute. (2)

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(1) In pleading the statute of Frauds it is necessary to say that the agreement was not reduced into writing, *Mussell* v. *Cooke*, Tr. 1720. Pre. Ch. 533.

(2) The case is differently stated in the Register's Book. One *Audley* granted a lease of the premises in question for four years to the plaintiff, *and then makes Sturman his executor*, and dies, then the plaintiff having laid out money on the premises came to a new agreement with *Sturman*, and *Paul Audley* the other defendant, and son of the said testator, and also with *Millicent Audley*, the widow, who was not made a party to the suit, for a lease of the said premises for 16 years, the lease was accordingly drawn up and approved by all the parties, and executed by *Millicent*, and the other parties promised to execute, and the defendant *Paul* in particular gave directions to the scrivener, who drew the lease, as to the apportionment of the rent between himself and his mother. The answer merely denies the agreement, and under these circumstances it was decreed that the defendant should execute the lease, so executed by *Millicent Audley*, Reg. Lib. 1683. A. fol. 104. Et vide *Owen* v. *Davis*, 1 Vez. 82.

Case 208.

Eq. Ca. Ab. 28, pl. 3. S. C. 147, pl. 11. S. P.

A creditor agrees to take less than his debt, so as the money is paid at a certain day; and the money not being paid at the day, he sues for the whole. Debtor not relievable.

SEWELL *versus* MUSSON.

A creditor having agreed with his debtor to take a sum of money less than his debt, so as it was paid precisely by such a day; he fails of payment, and now brings his bill, suggesting some equitable excuses, why he did not pay precisely at the day; and that he tendered the money within a

SEWELL v. MUSSON. [211]

day or two afterwards, and that the defendant refused to accept it, and sued for the whole at law.

To this the defendant demurred, for that the bill contained no equity; and insisted, that when he made an agreement in favour of the plaintiff, he might restrain and qualify it, as he thought fit; and that the plaintiff having failed of payment at the day, the defendant was not now bound by the agreement, or obliged to take less than his just debt.

Lord Keeper allowed the demurrer, and said, *cujus est dare ejus est disponere.* (1)

(1) Reg. Lib. 1683. B. fol. 173. So vide *Delamere* v. *Smith*, 1 Ch. Ca. 112. *Rose* v. *Rose*, Amb. 331. And the principle recognised in *ex parte Bennett*, 2 Atk. 526. So where *A.* agrees to lend *B.* a sum of money for a year, provided *B.* will execute a bond and mortgage for the same, the money is lent, and afterwards *B.* refuses so to do. *B.* shall not have a year to pay the money, but action at law lies immediately for money had and received by *B.* *Sic dict.* by *Eldon*, Lord Chan. 14th June, 1803, not reported.

DE

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TERMINO S. HILLARII,

35 & 36 Car. II. 1683.

IN CURIA CANCELLARIÆ.

Case 209.

15 *Januarii.*
In Court.
Lord Keeper.

Eq. Ca. Ab. 136, pl. 7. S. C.

STEPHENS *versus* DR. BERRY.

The Chancellor's Court in *Oxford* hath not jurisdiction of matters of freehold.

THE plaintiff exhibits his bill to be relieved touching some lands in *Cornwall*, and the defendant being head of *Exeter* college, in *Oxford*, pleads the privilege of the University of *Oxford*, and that he ought to be sued in the *Vice Chancellor's* court in *Oxford* only.

But his plea was over-ruled; for that matters of freehold are excepted out of the patent to the University, and their court can at best have but a lame jurisdiction, as to lands in *Cornwall.* (1)

(1) Plaintiff had leave to amend his bill without costs, Reg. Lib. 1683. B. fol. 269. So it has been held that in action for the recovery of the posses-

sion of a term *without claiming title to the freehold*, the University shall have no privilege, because the freehold may come in question, *Halley's* Case, Cro. Car. 87. *Cripps* and *Webb's* Case, Litt. Rep. 252. Et vide *Alden's* Case, 5 Co. Rep. 105. Where the same principle is recognized. So no jurisdiction to sequester lands in *Middlesex* or in mere matters of equity which are originally such, as to execute agreement in specie, *Draper* v. *Crowther*, 2 Vent. Rep. 362.

STAPLETON *versus* SHERRARD.

Case 210.

Eodem die.

Eq. Ca. Ab. 76, pl. 8. 2 Ch. Rep. 255. S. C.

Bill to discover who is tenant of the freehold, in order to bring a *formedon*, will not lie.

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Entry of remainder-man, within five years after a fine levied by tenant in tail will not save his right; for the fine being a discontinuance, he ought to make his claim by action.

THE bill sets forth that the plaintiff was entitled to certain lands, as remainder-man in tail, and prays a discovery, who was the tenant of the freehold, that he might know against whom to bring his *formedon*.

To this the defendant pleaded a *fine* and *non-claim* in bar; and likewise demurred.

*The *Lord Keeper* inclined that the demurrer was good; for that one shall not have a bill here in any case to discover a tenant to the *præcipe*, for there are ways to know it without; though the case of *Bickerton* and *Bickerton* was cited, where such a demurrer was disallowed. But the matter in the principal case went off upon the plea, which was allowed to be good: for though after the fine levied the plaintiff had made his entry, yet that would not do; the fine being levied by tenant in tail, which made a discontinuance of the estate, and therefore the plaintiff must make his claim by action. (1)

Afterwards the matter of this demurrer coming on to be argued again on the 5th of *February* following, the demurrer was allowed to be good. (2)

(1) Vide stat. 4 Hen. VII. cap. 24.

(2) There is a case of *Stapleton* v. *Stapleton*, of this date in the Reg. Book, where plea and demurrer allowed, Reg. Lib. 1683. B. fol. 334. Upon exceptions to the Master's Report, touching the insufficiency of an answer, tenant for ninety-nine years, remainder to trustees to support contingent remainders, remainder over, with several other remainders over in tail, tenant for ninety-nine years, with the first remainder-man levy a fine, and on that a recovery is suffered, and a settlement made on marriage *but with notice*, afterwards the second remainder-man in tail brought a bill for discovery of the deed of settlement, in order to know whether there had been a good tenant to the *præcipe* made; to this bill, the defendant demurred, but the demurrer was over-ruled. They then, by their answer, insisted on the fine which it was said at least caused a discontinuance of the estate, and so within the reason of the case of *Stapleton* v. *Sherrard*, (the principal case) or at least within the reason of the case of *Bunce* v. *Phillips*, post 2 vol. 50. But the Court seemed to give no great regard to the authority of these cases, neither could they imagine here was indeed any discontinuance or divesting of estates, the freehold remaining untouched, and the fine being levied by tenant in tail, in remainder, who did

not appear to have committed any disseisin, wherefore the defendants were ordered to set forth the deed in their answer, per *Talbot*, Lord Chan. in *Dormer* v. Sir *John Fortescue* & *Ux.* Hil. Term. 173¼ Lin. Inn. Hall.— Note, it was insisted that the plaintiff's remedy, if any, was at law: Sed per *Lord Chan.* without a discovery of the deed it is impossible for him to make any thing of it at law. Vide, however, *Sherborne* v. *Clarke*, post 273.

Case 211.

BREND *versus* BREND.

Eodem die.

Eq. Ca. Ab. 62, pl. 6. 162, pl. 1. 316, pl. 8. 2 Ch. Ca. 161. S. C.

A man marries a jointress of houses which are burnt down, and they borrow 1,500*l.* to rebuild, and levy a fine *sur concess.* and by deed between the husband and conusee the equity of redemption is reserved to the husband and his heirs; he lays out 3,000*l.* in building, and dies. Decreed the wife and not the heir to redeem.

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Upon a demurrer to a bill of *review*, the case was thus: the defendant had a jointure in some houses in *London* before the fire, of 100*l. per annum.* The houses are burnt down, and then the wife and husband borrow 1,500*l.* to build upon the ground, and levy a fine *sur concess.* for ninety-nine years, if the wife lived so long, and a deed is made between the conusee and the husband, wherein the husband covenants to repay the mortgage money with interest: and the equity of redemption is limited to the husband and his heirs, but the wife is no party to this deed: the husband expends 3 or 4,000*l.* in building upon this ground, and dies; the question was, whether the jointress or the heir of the husband should redeem. The *Lord Chancellor Nottingham* had decreed it to the wife, and now upon arguing the demurrer, the *Lord Keeper* was of the same opinion; for that the wife was no party to the deed of re-demise, by which the redemption was limited to the husband; and the wife being* a jointress, and having granted a term for years only out of her estate for life, there rests a reversion in her, which naturally attracts the redemption; (1) and said, if the cause had come originally before him, and there had been assets sufficient, the husband having covenanted to pay this money, he would have decreed it clear to the wife: it was as little as a husband could reasonably do, to rebuild the houses, and put his wife's jointure in as good plight, as it was before: and therefore allowed the demurrer to the bill of review. (2)

(1) Vide *Hoxard* v. *Harris*, ante 191.

(2) Reg. Lib. 1683. A. fol. 260, cited in *Jackson* v. *Parker*, Amb. 691. [See on the right to the equity of redemption of the wife's estate, where mortgaged by husband and wife, *Clinton* v. *Hooper*, 3 Bro. Cha. Rep. 201. 1 Ves. jun. 173. *Innes* v. *Jackson*, 16 Ves. 356. 1 Bligh, 104. *Ruscomb* v. *Hare*, 6 Dow. 1. *Kinnoul* v. *Money*, 3 Swan. 202. n. *Pitt* v. *Pitt*, 1 Turner, 180.]

BREND v. BREND.

In this case a debate arose touching the stating of the matters of fact in a decree, and it was complained, that the *registers* now drew up decrees in such a manner, as that no bill of *review* could be brought; for they only recite the bill and answer, and then add, that upon the reading of the proofs, and hearing what was alleged on either side, it was decreed so and so; and never mention what particular facts were allowed by the court to be sufficiently proved, and what not; that so upon a bill of *review* it might appear to the court upon what facts the decree was grounded.

See the next case.

The *Lord Keeper* declared, he would not allow of that way of drawing up decrees in general; but that the facts that were proved, and allowed by the court as proved, should be particularly so mentioned in the decree; otherwise, if a bill of *review* was brought, those facts would be taken as not proved. (1) For else a decree could never be reversed by a bill of *review*, but all erroneous decrees must be reversed upon *appeals*. (2)

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(1) Upon a bill of review the plaintiff cannot assign for error that any of the matters decreed are contrary to the proofs in the cause, *Mellish* v. *Williams*, ante 166.

(2) Vide *Broad* v. *Broad*, 2 Ch. Ca. 161, probably the same case. And on appeal, as on a bill of review, the cause must be on the same evidence as in the original cause; there can be no examination *de novo*, *Addison* v. *Hindmarsh*, post 443. Et vide *Anon.* 2 Freem. Rep. 31. But papers in the hands of a party to the former cause, after publication passed, though not produced, may be read upon a bill of review, Sir *Thomas Standish* v. *Radley*, 2 Atk. 179.

BONHAM *versus* NEWCOMB.

Case 212.
25 *Januarii.*
In Court.
Lord Keeper.
Ante Case 6.
Post Case 227.
[215]

THIS case came now before the court upon a demurrer to a bill of review to reverse a decree made in this cause by the *Lord Chancellor Nottingham:* and the error assigned was, that the defendant *Newcomb* ought not to be admitted to a redemption against his express agreement in the mortgage deed to redeem within a certain time, or otherwise that the estate should be irredeemable.

It was argued for the demurrer,

1*st.* That an estate could not be a mortgage at one time, and afterwards become an abso te purchase, by one and the same deed.

BONHAM v. NEWCOMB.

2*dly*. That the mortgagee in this case had a proper remedy, and might have made his estate absolute in a legal course, *viz*. by exhibiting a bill to foreclose the mortgagor of the equity of redemption: and they cited the case of *Yieldmington* and *Gardiner*, where the mortgagor was to redeem during life *only*, and yet his heir admitted to the redemption; and Sir *Robert Jason's* case, where an estate was to go to his wife and her heirs, unless a sufficient jointure were settled within such a time limited in the deed, and the case of *Howard* and *Harris*.

Ante Case 31 & 191.

But as to that case, it was answered, though there was a qualified redemption, yet there was an express covenant for repayment of the mortgage money, and so it was in the power of the mortgagee to make it a mortgage at any time. (1)

But the *Lord Keeper* inclined to reverse the decree, for that *modus & conventio vincunt legem;* and all conditional purchases or bargains must not be turned into mortgages: and said, that where there is a condition or covenant, that is good and binding in law, equity will not take it away.

[216] It was objected against the bill of *review*, that they had assigned errors collected from the proofs in the cause, that did not appear in the body of the decree.

See the last preceding case.

But the *Lord Keeper* observed, that was occasioned by the ill way they had got of late in drawing up decrees in general, without particularly stating the matters of fact: and said the plaintiff in a bill of review should not be concluded by it; unless the matter of fact were particularly stated in the decree.

At last it was agreed by the counsel to wave the signing and enrolling the decree by consent, and to hear the cause again *de integro*. (2)

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(1) In general this is no rule against redemptions in common and ordinary cases, though there is no such covenant, *Mellor* v. *Lees*, Feb. 5, 1742, 2 Atk. 494. And if a man make a mortgage and covenant, or even take an oath not to bring a bill to redeem, yet he may redeem. Arg. *East India Company* v. *Atkyns*, Comyns Rep. 349.

(2) The order in this case was, "That "the demurrer should be over-ruled, "but without costs, and that the "plaintiffs should be at liberty to set "down the former cause to be heard "*ab origine*, the inrolment notwithstanding, and that in the mean time "all proceedings on the former decree and inrolment be thereby suspended." Reg. Lib. 1683. A. fol. 236. Vide post 232, S.C. Note a bill of revivor was allowed as to matters, part of the matters mentioned in a previous decretal order, but omitted in the final decree, on a plea and demurrer, *Williams* v. *Arthur*, 1 Ch. Ca. 37.

CIVIL *versus* RICH.

Case 213.
29 *Januarii.*
In Court.
Lord Keeper.

Eq. Ca. Ab. 153, pl. 1.
2 Ch. Ca. 160. S. C.

Real estate settled by a freeman of *London* on a child no bar to the orphanage part, *Ante Case* 176.

A child advanced in marriage with a portion is barred of the orphanage part, unless the certainty of such portion appears by writing under the father's hand. *Ante Case* 78.

THE custom of the city of *London* touching orphans was certified to be; that where an heir or co-heir had a real estate settled on him by the father, that the same was out of the custom of the city of *London;* and though the father should afterwards declare the same to be a full advancement for such child, yet that was no bar to his orphanage part, neither was it to be brought into *hotch-pot;* but was clearly out of the custom. (1)

though such settlement declared by the father to be a full advancement.

And it was said, that by the custom of the city of *London*, where a child is married (2) with the father's consent, and there is a portion given in marriage, such child is debarred from claiming any benefit of the orphanage part; unless the father shall by writing under his hand and seal not only de-

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(1) So money given by freeman to be laid out in land, and settled on his eldest son for life, remainder to his first and other sons in tail, shall not be taken as part of advancement, *Annand* v. *Honeywood*, post 345. So a jointure out of land if not expressed to bar, will not bar the wife's customary part, *Atkins* v. *Waterson*, 1 Eq. Ca. Ab. 157, pl. 5, but if expressed to be in bar it will be so, *Babington* v. *Greenwood*, 1 P. Wms. 531. And a leasehold settled on wife previous to marriage, in recompence and bar of dower, and for a provision for the wife is not a bar to her claim of thirds, *Creswell* v. *Byron*, 3 Bro. Ch. Rep. 361. So where freeman leaves widow a legacy and there is sufficient out of his testamentary part to pay the same she shall have legacy and her customary part also, *Babington* v. *Greenwood*, ub. sup. But the widow has no claim upon what is brought into hotchpot among the children, Lord *Kircudbright* v. Lady *Kircudbright*, 8 Ves. 64. But if lands of inheritance be given to a child by the freeman in bar of the orphanage part, and accepted as such it will be binding, or at least the child cannot have both, *Cox* v. *Belitha*, 2 P. Wms. 272. Et vide note (A) there. *Note.*—It is sufficient if the custom be certified by the Recorder at the bar, *ore tenus*, *Lewin* v. *Lewin*, 3 P. Wms. 15. And at the common law no officer was bound to sign a return, per *Holt*, Ch. Just. *Mayor of Thetford's* Case, 1 Salk. 192, 2 Lord Raym. 848, S. C. And the statute of *York*, 2 Ed. II. cap. 5, obliges a sheriff to do it, but does not extend to mayors, coroners, or other officers, ibid. Vide *Rex* v. *St. John's College, Cambridge*, Skin. Rep. 368. And it is said where a custom of *London* has been once certified the court must take notice of it, and need not have it certified over again, *Blacquiere* v. *Hawkins*, Doug. 378.

(2) A daughter of a freeman marrying without her father's consent, loses her orphanage part, unless he is reconciled to her before his death, *Foden* v. *Howlett*, post 354.

CIVIL v. RICH. clare, that such child was not fully advanced, but likewise mention in certain, how much the portion given in marriage did amount unto; that so it may appear what sum is to be brought into *hotch-pot.* (1)

(1) The certificate in this case is not stated in the Register's Book, several proceedings were had, and certificates made, but the decree was at last made upon a compromise, which took place between the parties, Reg. Lib. 1683. A. fol. 596. Trin. Term. *Fawkner* v. *Watts*, 1 Atk. 407.

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Case 214.

JEFFEREYS *versus* SMALL.

Eodem die.
In Court.
Lord Keeper.

Eq. Ca. Ab. 370, pl. 1.

Two persons occupy and stock a farm jointly. There shall be no survivorship.

But if two take a lease jointly of a farm, the lease shall survive.

Not necessary in articles of copartnership to provide against survivorship.

Where two are jointly interested by way of gift, survivorship takes place.

Otherwise in a joint undertaking in the way of trade.

Two persons having jointly stocked a farm, and occupied it as joint-tenants, the bill was to be relieved against survivorship, one of them being dead: and though it was proved in the cause, that the deceased was informed, what the consequence of law was in case he should die, and that he thereupon replied, he was content the stock should survive; yet the *Lord Keeper* was clear of opinion, that the plaintiff ought to be relieved: and said, if the farm had been taken jointly by them, and proved a good bargain, there the survivor should have had the benefit of it; but as to a stock employed in way of trade, that should in no case survive. The custom of merchants, as to bills of exchange, is now extended to inland bills, and the custom of merchants is extended to all traders, to exclude survivorship: (1) and though it is common for traders in articles of copartnership to provide against survivorship; yet that is more than is necessary: and he said, he took the distinction to be, where two become joint-tenants or joinly interested in a thing by way of gift or the like, there the same shall be subject to all the consequences of law; (2) but as to a joint undertaking in the way of trade or the like, it is otherwise: and decreed for the plaintiff accordingly. (3)

(1) Vide Vin. Ab. Tit. Surv. (D).

(2) Vide *Hall* v. *Digby*, 4 Bro. P. C. 224. Salk. 444. *Martin* v. *Crump*, Bunb. 312.

(3) No point appears to be more clearly settled than this, Co. Litt. 182 a. *Lake* v. *Craddock*, 3 P. Wms. 158. Vide *Usher* & *Prime* v. *Ayleworth*, post 360, and cases cited there. *Note.*—In a case *Executor of Elliot* v. *Brown*, before Lord *Thurlow*, July 25, 1791, not reported, *Elliot* & *Brown* had a joint demise of a farm *the profits of which they divided annually*, held on

the death of *Elliot* his moiety went to his executors. [See *Lyster* v. *Dolland*, 1 Ves. jun. 431. *Jackson* v. *Jackson*, 9 Ves. 597, and the Note there. *Aveling* v. *Knipe*, 19 Ves. 441.]

DOMINA SPEAKE *versus* DOMINA SPEAKE. (1)

Case 215.

Eodem die.

In Court.

Lord Keeper.

Eq. Ca.Ab.221, pl. 7. S. C.

THE bill was to have a jointure, defective in value, made good; the husband having covenanted, that the lands settled for the plaintiff's jointure were 700*l. per ann.* whereas they were but 500*l.*

A man covenants that lands settled for a jointure are of such a yearly value. This relates only to the time of the settlement, and not to the death of the husband.

The defendant was decreed to perform the covenant in *specie;* but the value of the lands were to be estimated, as they were at the time of the jointure settled, and not according to the present value; rents being now much fallen every where: but if the covenant had been that they were of 700*l. per ann.* and should so continue, then they should have been made up full 700*l. per ann.* at this time.

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Settlement for a jointure is made in pursuance of articles, and there is a covenant in the articles that the lands are of such a yearly value, but it is omitted in the settlement. This covenant doth subsist.

It was objected for the defendant, that this covenant for the value was only in the first articles, and not in the jointure deed; and that therefore the articles being executed, and this settlement of a jointure, wherein there is no covenant as to the value, accepted as a performance of the articles, the plaintiff ought not now to resort back to the covenant; and though this settlement was made when the plaintiff was an infant and a feme covert, and so no acceptance of hers could conclude her, yet it was accepted by her father, with whom the articles were made, and he transacted this whole affair on her behalf. *Sed non allocatur.* (2)

(1) This case reported, Skin. 158, under the name of *Speake* v. *Pedley*, but on a different question.

(2) Defendant was ordered to pay the arrears since the death of plaintiff's husband. No costs given. Reg. Lib. 1683. A. fol. 239. Vide *Benson* v. *Bellasis*, ante p. 15, post 369. *Washborne* v. *Downes*, post 440. *Lady Clifford* v. *Lord Burlington & Al.* post 2 vol. 379, where tenant for life, with power to make a jointure of 1,000*l. per ann.*, afterwards gives a particular of lands mentioned to be 1,000*l. per ann.* which are settled for the jointure, but prove to be but 600*l. per ann.* Decreed the jointure to be made up 1,000*l. per ann.* against the issue in tail, who was neither privy to the marriage, nor guilty of any fraud. Co. Lit. 37.

Case 216.

HOBY *versus* HOBY.

Eodem die. In Court. Lord Keeper.

Eq.Ca.Ab.220, pl. 9. 2 Ch. Ca. 160. S. C.

Equity will relieve against a fraudulent and partial assignment of dower by the sheriff.

THE bill was to be relieved against an assignment of dower by the sheriff, which in the bill was charged to be fraudulently done; there being assigned to the defendant for her dower, one full third part of the lands, which amounted to 300*l. per ann.* and in this third part there was a coal-work, which one year with another was worth 300*l. per ann.* beyond all charges; and yet no consideration was had of it in the assignment of this dower: and it likewise appeared, that the defendant's own father was the only person that on the behalf of the infants the children defended the writ of dower, and appeared to see the same set out, which looked like a collusion: and the plaintiff's counsel offering, that the defendant should have one entire third both of land and coal-

[219] works, and that by way of a rent charge on the whole, the court ordered, she should accept thereof: or that otherwise a new assignment of dower should be made: and she took time to consider of it. (1)

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(1) The court proposed to the parties that the defendant should either take 300*l. per ann.* the sum originally proposed to be settled on her by articles before the marriage, or that she should work all the coal pits and dig coals, as well on the plaintiff's land as the land assigned the defendant in dower, and to take a third penny thereof, or else a new writ of seizin on the said judgment should be issued to the sheriff, to divide the lands into three parts and to choose by lot; the defendant thereupon consented to accept a third penny of the clear profits of the said estate, provided she might have it allotted to her out of the lands and coal works already allotted her in dower, which not being opposed on the part of the plaintiff was so decreed, and the defendant was to be at liberty to break or make any new mouths to the said coal pits, in any part of the plaintiff's lands, not assigned, or any part of the lands assigned her in dower, and to work the same as she should think fit, and should at any time sink pits, work, dig, sell and carry away coals in and from any part of the plaintiff's lands, not assigned in dower, as well as in what lands are assigned the defendant in dower, allowing and accounting to plaintiff for two-third parts of the clear profits, and the defendant was to have an allowance of 40*l. per ann.* out of plaintiff's two-thirds of the profits to repair the mansion-house, Reg. Lib. 1683. A. fol. 256. And the want of a formal assignment is not regarded in equity, it is the right in conscience on which the court will act, in respect of dower, *Hamilton* v. *Mohun*, 1 P. Wms. 122. And the court will assign dower, and order title deeds to be delivered for the proof of seizin, *Moore* v. *Black*, Forr. 126. *Meggot* v. *Meggot*, Dick. 794. *Goodenough* v. *Goodenough*, 31 Jan. 1772, Dick. 795, where dower was decreed to be allotted to be set out by the Master, and the dowress to be let into possession. But the title must be admitted or established, and then the court will assign dower though no obstruction at law, *Mundy* v. *Mundy*, 4 Bro. Ch. Rep. 295. 2 Ves. jun. 122, S. C. *Curtis* v. *Cur-*

tis, 2 Bro. Ch. Rep. 620. As to election where provision in bar of dower, *Strahan* v. *Sutton*, 3 Ves. 249. *Pickering* v. Lord *Stamford*, ibid. 337. *Greatorex* v. *Carey*, 6 Ves. 615. [*Birmingham* v. *Kirwan*, 2 Sch. & L. 444. *Miall* v. *Brain*, 4 Madd. 119.] and cases there cited. As to costs where apportionment of dower by consent, and in case of a writ of dower on an assignment of dower, *Lucas* v. *Calcraft*, 1 Br. Ch. Rep. 134. And as to the operation of the statute of limitations in the case of dower, *Oliver* v. *Richardson*, 9 Ves. 222, where an account of arrears of dower for twelve years past, the time of the title accruing, decreed.

REEVE *versus* REEVE.

Case 217.

5 *Februarii. In Court. Lord Keeper.*

Eq.Ca.Ab.221, pl. 3. 335, pl. 1. 2 Vent. 363. S. C. Rather differently stated.

THE case was, Sir *Richard Reeve* having issue by a former venter, by deed charges his lands at *Bickerton*, for the payment of 3,000*l.* portion to his daughter, and afterwards marries a second wife, and makes her a jointure of a moiety of these lands at *Bickerton*, without taking notice of this charge of 3,000*l.* He afterwards by his will, thinking that this 3,000*l.* charged as aforesaid would be good against the jointure, takes notice thereof, and devises to his wife other lands in *Yorkshire* in lieu of her jointure in *Bickerton*, and dies.

A. charges land in *D.* with a portion for a daughter by a first venter, and then marries, and settles part of these lands for the jointure of a second wife, who has no notice of the charge. *A.* believing the portion would take place of the jointure, by will gives other lands in *E.* in lieu thereof.

The wife and the son and heir agree together to defeat the daughter of her 3,000*l.* portion; and therefore the wife finding that the settlement, which was made on her marriage, though subsequent in time, would yet prevail against this charge of 3,000*l.* which was voluntary and fraudulent as to her, she adheres to her jointure, and refuses to accept of the devise. The daughter's bill is to be relieved.

The wife by combination with the heir refuses to accept the devise.

The *Lord Keeper* decreed, the plaintiff should hold such part of the lands in *Yorkshire*, as should be equal in value to such of the lands in *Bickerton* as were comprised within the jointure, until her portion was raised. (1)

Decreed the daughter should hold the lands in *S.* till her portion was paid.

(1) Vide this case recognised by Lord Hardwicke in *Lanoy* v. *Duke* and *Duchess of Athol*, 2 Atk. 447.

Case 218.

CRESSET *versus* KETTLEBY.

Eodem die. In Court. Lord Keeper.

Eq. Ca. Ab. 37, pl. 5.

When a bill is in the disjunctive, the defendant by his plea may take it either way.

THE bill was that the plaintiff's father by settlement on his first marriage was only tenant for life, or else tenant in special tail, and the plaintiff was the eldest son of *that marriage; and that the defendant claimed by a subsequent settlement, having notice of the first.

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The defendant pleaded a fine levied by the father, and set forth her title under the second settlement, and insisted she was a purchaser, but did not plead she had no notice of the first settlement. (1)

Lord Keeper, the bill being in the disjunctive, the defendant might take it either way; and having pleaded a fine, which is a bar, supposing the father to be tenant in tail, allowed the plea. (2)

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(1) This does not appear in the Register's Book, the plea, as there stated, is, "that defendants were purchasers "by deeds, fines, and settlements made "in pursuance of certain marriage ar- "ticles, and in consideration of a mar- "riage portion, whereby the lands and "premises so claimed by the plaintiffs "are well and legally vested in the de- "fendants, and that plaintiffs have no "title or colour or pretence of title "thereto."

(2) Plaintiff was at liberty to amend his bill. Entered by the name of *Cressett* v. *Cressett*, Reg. Lib. 1683. A. fol. 389.

Case 219.

EARL of NEWBURG *versus* WREN.

Eodem die. In Court. Lord Keeper.

Eq. Ca. Ab. 80, pl. 2. 134, pl. 3. S. C.

After a bill brought in the Exchequer to foreclose, the defendants may bring a bill in this court to redeem, and the pendency of the former suit is not pleadable.

THE plaintiff's bill was to foreclose the defendant, and the defendant pleaded, that he had already exhibited a bill against the now plaintiff in the *Exchequer* to redeem, to which bill the defendant there (the now plaintiff) had answered; and the subject matter of that suit being the same with the plaintiff's bill in this court, the defendant pleaded the pendency and priority of the former suit in the *Exchequer*, in bar to the plaintiff's bill here.

And for the plea it was argued by the *Solicitor General* and others, that this bill here was but in the nature of a *cross* bill to that in the *Exchequer*, which the now plaintiff might have exhibited there, and then one account of the profits would have served for all, and it was vexatious in the plaintiff to bring the same matter in issue in another court

at the same time: and if the *Deputy Remembrancer* in the *Exchequer* should take the account one way, and a *Master* here should take it another, it would breed confusion: and if this court should be of an opinion, that there ought to be no redemption, and the *Exchequer* should decree a redemption, the jurisdictions would clash: and therefore to avoid these inconveniences priority of suit ought to give jurisdiction to the *Exchequer*.

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But the *Lord Keeper* over-ruled the plea, and said, this court must deny justice to none; and a plaintiff has a liberty to commence his suit in what court he thinks fit: and the *Chancery* was the *highest* court of equity: and though the *Exchequer* was an ancient court of equity; yet the same was but a *private* court, and its jurisdiction properly was only for getting in the *King's* revenue, and for the *King's* officers; and they ought to keep within their proper bounds: (1) and if there should happen any of the inconveniences mentioned by Mr. *Solicitor*, there are several precedents, that injunctions have gone to the *Exchequer* in such cases. (2)

Court of *Exchequer* a private court, and its proper jurisdiction concerns only the King's revenue and the King's officers.

This court has sent injunctions to the court of *Exchequer*.

And the plaintiff's counsel urged the case was much stronger, for the defendant *Wren* had bought one *Doyly's* title, and *Doyly's* title was from one *Ball*, who had formerly exhibited his bill to redeem in this court, and upon hearing his bill was dismissed: so that in truth this court was first possessed of the cause, and this dismission was afterwards pleaded in the *Exchequer*, and *Doyly* was privy to it, but the Court of *Exchequer* disallowed the plea.

Lord Keeper declared his opinion to be, that in any case if the mortgagor exhibited a bill to redeem in the *Exchequer*, that the defendant there should be at liberty to exhibit a bill to foreclose in this court: and over-ruled the plea, and ordered the defendant to pay costs. (3)

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(1) So of the Dutchy Court, *Attorney General* v. *Vernon* & *Al*, post 281. Vide 4 Inst. cap. 36, p. 209.

(2) So party restrained in this court from setting up decree of Court of Exchequer, *Barnesley* v. *Powel*, 1 Vez. 287.

(3) Nothing said of costs in the Register's Book, Reg. Lib. 1683. A. fol. 225. So after two issues directed out of the Exchequer, and bill dismissed, yet an original bill may be brought in Chancery for the same matters, *Anon.* 1 Ch. Ca. 155. Vide *Coysgarne* v. *Jones*, Amb. 613, where after bill filed and decree had in the Exchequer by certain creditors, a bill was filed in Chancery by other creditors which was entertained on the ground that decree in the Exchequer was not complete. But after a decree in the Exchequer *and affirmed in Dom. Proc.* Chancery refused to entertain a suit, *Jay* & *Al* v. *Braine*, 1 Eq. Ca. Ab. 135, pl. 4. And in the case of an extent from the crown, Chancery will not examine the

quantum of the King's debt. *Brown* v. *Trant*, post 2 vol. 426. As to the interference of Chancery where *extent in aid* out of the Exchequer, vide *Capel* v. *Brewer*, post 469. and cases cited in not. there. [Where there is an original bill in the Exchequer, a cross-bill may be filed in Chancery. *Parker* v. *Leigh*, 6 Madd. 115. See also *Jackson* v. *Leaf*, 1 J. & W. 232.]

Case 220.

SIR JO. LOWTHER *versus* CARILL.

Eodem die. In Court. Lord Keeper.

A. agrees by parol with *B.* for a lease which is drawn, and then perused and corrected by *A.'s* counsel, and afterwards ingrossed and executed by *B.* Whether this is within the statute of *Frauds* as to *A.*

THE defendant having agreed to purchase a lease of the plaintiff, the lease was drawn and some alterations made in it by the defendant's counsel, and it was afterwards ingrossed and sent down into the country to the plaintiff to be executed, who accordingly executed the same: but the lease not being returned within the time agreed on, but kept in the country *three* months longer than it ought to have been, and the defendant upon enquiry finding she was to pay too much for this lease, when the deed was returned, she refused to accept it, or to execute a counterpart. The plaintiff's bill was to compel her to it.

The defendant pleaded in bar the act of *Frauds* and *Perjuries*, and that she had not signed any agreement in writing.

And for the defendant it was strongly insisted, that by the letter and meaning of the act of parliament the defendant ought not to be bound by this agreement, she or her agent having not signed the same; and though Sir *Jo. Lowther* had executed the lease on his part, yet the defend-
[222] ant ought not to be bound, the words of the act being that the agreement must be signed by the party that is to be bound by it.

Lord Keeper ordered the defendant to answer, and to save the benefit of the plea to the hearimg. (1)

(1) Without costs, Reg. Lib. 1683. B. fol. 216. No subsequent proceedings appear. Vide *Deane* v. *Izard*, ante 159, and cases cited there. *Halfpenny* v. *Ballett*, post 2 vol. 373. *Hatton* v. *Gray*, 2 Ch. Ca. 164. [*Hawkins* v. *Holmes*, 1 P. Wms. 770. *Stokes* v. *Moore*, 1 Cox, 219. *Shippey* v. *Derrison*, 5 Esp. N. P. C. 190.]

HAYWARD *versus* ANGELL.

Case 221.
6 *February.*
In Court.
Lord Keeper.
Portions given by will to 3 daughters, upon condition they released certain lands to the heir; one dies without releasing. Whether the portions of the other daughters shall be paid.
[*223]

Upon a demurrer to a bill of *review* upon a decree made by the *Lord Chancellor Nottingham*, the error assigned was, that the defendant's wife's father having given portions to his daughters, in case they should release to his heir their right to certain lands, (1) one of the daughters happened to die before she had given any such release, and therefore the heir refused to pay the portions; and thereupon the other daughters having exhibited their bill to be relieved, they were dismissed; whereas the portion was *two thousand* * pounds to each daughter, and the land to be released was not worth 500*l.* and the performance of the condition was prevented by the act of *God*.

For the demurrer it was argued, that this was a condition precedent, and being not performed there could be no relief; and cited *Fry* and *Porter's* case, and that this case was much stronger than that; for the words are, *if his daughters should release then he appointed them such and such portions upon condition they should release, &c.* so that the condition was double; and is as full as can possibly be penned, to exclude the daughters from all benefit of their portions, unless they should release: and Serjeant *Maynard* would have it to be stronger than an ordinary condition precedent, it being, if they should release then he gave, &c. and said, there was a difference between a condition in the giving a portion, and a portion given upon condition; for in the former case the portion does never arise unless the condition is performed.

But the *Lord Keeper* inclined to over-rule the demurrer: and said, in all cases where the matter lies in compensation, be the condition precedent or subsequent, he thought there ought to be relief. (2) And by agreement the signing and enrolling the decree was set aside, and the cause to be heard *de integro*. (3)

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(1) Such a condition is to be taken distributively, (i. e.) that they only should forfeit who should not release, *Hawes* v. *Warner*, post 2 vol. 478.

(2) Vide *Popham* v. *Bampfield*, ante p. 83. *Bertie* v. *Lord Falkland*, post 2 vol. 340. 1 Salk. 231, S. C. Where held by Lord *Somers*, that where a condition is precedent this court could not relieve where non-performance; but that decree reversed in the House of Lords.

(3) Demurrer over-ruled, Reg. Lib. 1683. A. fol. 408.

Case 222. **SIR JAMES JOHNSON *versus* DESMINEERE.**

9 *Februarii.*
In Court.
Lord Keeper.

Eq. Ca. Ab. 83, pl. 5. S. C. Decree of the court of *policies* and *assurances* in *London* reversed, because the bill there was taken *pro confesso* after the first summons.

THE plaintiff's bill was an appeal from a decree of the court of *policies* and *assurances* in *London;* whereby the defendant below not appearing upon the first summons, the bill was ordered to be taken *pro confesso* against him: and for the plaintiff it was insisted, that though by the statute 43 *Eliz. cap.* 12. and the statute 14 *Car.* 2. *cap.* 23. the commissioners may proceed in a summary course without [*224] *formalities of pleadings, yet it was very extraordinary to take a bill *pro confesso* upon the first summons; and they ought at least to have had the allegations in the bill proved, before they proceeded to make such order: and it was said, though the course in this court now is to take a bill *pro confesso* after the party has once appeared and stands out in contempt till the plaintiff is got to the end of the line, and has run through all the process of the court against him; yet formerly this court did not do it, even in that case, without putting the plaintiff to prove the substance of his bill. (1)

Whereupon the *Lord Keeper* reversed the decree: and though in this case the appeal was not brought within two months after the decree, according to the said act of the 43d *Eliz.* yet in regard the defendant could not make out, that the now plaintiff had been fairly summoned, the *Lord Keeper* admitted the appeal; (2) and thereupon the parties agreed to

(1) Vide *Hawkins* v. *Crook*, 2 P. Wms. 557-8. Moseley 294, 383, S. C. *Davis* v. *Davis*, 2 Atk. 21. As to bills *pro confesso*, after amended bill, and answer, *Joplin* v. *Stuart*, 4 Ves. 619. *Turner* v. *Turner*, and *Bacon* v. *Griffith*, cited in note there. As to application to the court for bills to be taken *pro confesso*, on defendant's having absconded, vide stat. 5th Geo. II. cap. 25, sec. 8. *Neale* v. *Morris*, 5 Ves. 1. *Bishop of Winchester* v. *Beaver*, ibid. 113. by which it is settled that the court will not make the order for the bill to be taken *pro confesso*, under the statute, unless the affidavit thereby required positively state that the defendant has been in the kingdom within two years before the *subpœna* issued. And the decree upon a bill taken *pro confesso* is not to be drawn up by the plaintiff but pronounced by the court, *Geary* v. *Sheridan*, 8 Ves. 192. [See further on taking bills *pro confesso*, *Williams* v. *Thompson*, 2 Bro. Ch. Rep. 279. *Attorney-General* v. *Young*, 3 Ves. 209. *Seagrave* v. *Edwards*, 3 Ves. 372. *Hearne* v. *Ogilvie*, 11 Ves. 77. *Sidgier* v. *Tyte*, 11 Ves. 202. *Lewis* v. *Marsh*, 2 S. & S. 220.]

(2) The costs in the court of policies were not taxed, nor execution signed by the Commissioners till so late as that the two months allowed by the act did not intervene between the completion of the decree (without which taxation and signing *Lord Keeper* said the decree was not complete) and the appeal: and the court declared, that the two months ought to be reckoned from the

try the matter in an action on the case, the plaintiff by order being not to insist upon the statute of Limitations. (1)

JOHNSON v. DESMINEERE

first service with, or other regular notice of the decree, and also that the act had provided a power to punish defaulters by contempt by commitment, which course the Commissioners ought to have taken for an answer. R. L.

(1) Reg. Lib. 1683. A. fol. 706. plaintiff not allowed costs, the suit being to reverse the commissioners' decree.

ATTORNEY-GENERAL *versus* SYDERFEN.

Case 223.

11 *Februarii.* *In Court.* *Lord Keeper.*

Eq. Ca. Ab. 96, pl. 8. S. C.

Devise of 1,000*l.* for such charity as testator had by writing appointed, and no such writing being to be found, the king appointed the charity, and the same was decreed accordingly.

MR. SYDERFEN, the defendant's brother, having by his will (amongst other things) charged a manor in the *west* of *England* with the raising 1,000*l.* out of the profits, *to be applied to such charitable uses as he had by writing under his hand formerly directed*, and no such writing being to be found; and the defendant his brother and heir at law being in possession of the estate; the bill was brought in the name of the *Attorney-General* at the relation of the *Governors* of *Christ's Hospital*, setting forth the will, and that no such writing as was mentioned therein was now to be found, and that therefore the application of this charity was in the *King*, and charging that the testator in his lifetime had frequently expressed his good intentions towards this *hospital*; and that the *King* being informed that there was no such writing to be found as aforesaid, had been graciously pleased to declare his will and pleasure to be, that this money should be laid out for the benefit of the *mathematical* boys, which were of his own foundation in *Christ's Hospital*; and it was therefore prayed, that the same might be so applied.

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The defendant by answer confessed the will, but that the writing therein referred unto was not to be found; and that he believed if any such writing was at any time made by the testator, it was afterwards by him revoked and cancelled; for that subsequent to the making of this will, he had charged several great sums of money upon his land, and that the whole estate would scarce amount to answer all the charges thereon, and the heir would be disinherited and left without any provision.

Lord Keeper. It is no question but the charity being now general and indefinite, (this writing not being to be found)

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the application of this money is now in the *King;* and his Majesty having declared his pleasure to have it disposed for the benefit of the *mathematical* boys of his foundation in *Christ's Hospital,* he thought it could not be better laid out: and though by the will it was directed to be raised out of the profits, yet it being a gross sum, he thought it would carry interest to the time it should be paid, and raised out of the profits: and forasmuch as by the will it was intended to be a permanent charity, he referred it to a master, who by the approbation of Mr. *Attorney-General* should see it laid out in land for the benefit of the said *mathematical* boys, and decreed the same accordingly. And cited the case of *Frier* versus *Peacock* in this court; where *Frier* the testator had given several particular charities by his will, and devised the surplus *for the good of poor people for ever;* and a bill being brought, that the surplus which was devised indefinitely, might be applied for the benefit of *Christ's Hospital* by the *King's* direction, it was so decreed; although there were poor kindred of the testator's, who insisted, they were within the equity of that general devise to a charity. (1)

A devise for the good of poor people. The devise being indefinite, the king may appoint the charity.

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Note.—In this case the defendant by the decree was to be indemnified against the writing referred unto in the bill, in case it should be afterwards found. (2)

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(1) A devise of a particular sum in these words, "To the *nearest and poorest* of my relations," and the devise was held void; for persons that are to take by a will should be described with certainty. *Secus* had the devise been to the *nearest* of my relations, for there the person might easily have been known, per *Comyns*, Ch. Baron, in the Exchequer. *Hazel* v. *Rumney*, Trin. Vacation 1733. A man devises his personal estate to the use of *his relations*, and the *poorest* and most necessitous of his relations, without specifying any in particular. And it was decreed to be distributed according to the Stat. of Distributions, which is the best measure for setting bounds to such general words, *Roach* v. *Hammond*, Prec. in Chan. 401. *Anon.* 1 P. Wms. 327, and cases cited in note there. But where a residue is given in trust for such of testator's relations as *A.* shall judge proper, it is not confined to the next of kin, *Bennet* v. *Honeywood*, Amb. 708. One devises 15*l.* a-piece to each of his relations, of his father and mother's side, and gave the surplus of his personal estate to *A.* and makes *B.* executor, the court would not restrain the devise to relations within the stat. of Distributions, *Jones* v. *Beale*, post 2 vol. 381. [See also *Macleroth* v. *Bacon*, 5 Ves. 159. *Cruwys* v. *Coleman*, 9 Ves. 319. *Smith* v. *Campbell*, 19 Ves. 400. Coop. 275. *Anon.* 1 Madd. 36. *Doe* v. *Over*, 1 Taunt. 263.]

(2) Reg. Lib. 1683. A. fol. 340. Vide *Attorney-General* v. *Downing*, Amb. 550. *Attorney-General* v. *Andrew*, 3 Ves. 633. *Attorney-General* v. *Bowyer*, ibid. 714. *Attorney-General* v. *Bishop of Chester*, 1 Bro. Ch. Rep. 444. *Moggridge* v. *Thackwell*, 3 Bro. Ch. Rep. 576. 1 Ves. jun. 464. On re-hearing, 7 Ves. 36., where in

note (A) p. 43, there is a report of the principal case from the Register's Book, and where the cases and learning on this subject are fully discussed.

[*Mills* v. *Farmer*, 1 Mer. 55. *Ommaney* v. *Butcher*, 1 Turner, 260. *Pieschel* v. *Paris*, 2 S. & S. 384.]

BASKET *versus* PIERCE.

Case 224.

Eodem die. In Court. Lord Keeper.

Eq. Ca.Ab.256, pl. 4. S. C.

Cestui que trust in tail with remainder over levies a fine and dies without issue, and there are five years and *non-claim*.

By opinion of *Lord Keeper* remainder-man barred.

A MAN by his will devises his lands to trustees for 99 years, for the payment of his debts and legacies, and afterwards in case they should not act and take upon them the trust within six months after his death, then he devised the said lands to another and his heirs in trust to pay his debts and legacies, and afterwards to *A.* in tail, remainder in tail to *B.* *A.* levies a fine, and dies without issue. Five years pass and *non-claim*.

The question was, whether this fine by *cestui que trust* in tail and *non-claim*, should bar the remainder-man in tail? and the *Lord Keeper* was of opinion, that it should: for equitable rights are as well to be bound by *fines*, as actions and titles at law; and cited the case of *Freeman* and *Barnes*, (1) where a fine by *cestui que trust* was adjudged a good fine and bar; and he was of opinion, that it would bind at law.

But it being urged for the plaintiff, that in the case of *Freeman* and *Barnes*, there the fine was levied by the *cestui que trust* that had the whole entire estate in him, and so was to work upon his own equity only; but here the *cestui que trust* had but an estate tail only, which was spent, and there were other remainders over: and they did insist in this case, that the remainder-man was not barred by *non-claim*; for that all the debts and legacies were not paid, and so his title was not commenced; and the term for 99 years did subsist, and was not expired; and it was insisted, that the entire estate at law being in the trustee, he ought to have en- [227]

(1) 2 Kel. Rep. 597, 650, 1 Vent. 55, 80. 1 Sid. 458. 1 Lev. Rep. 270. Carter 161. 195. S. C. *Seys* v. *Price*, in Ch. Trin. 1740, where lands were devised to trustees for payment of debts and legacies, and raising portions, and then to *J. S.* in tail. *J. S.* before the debts paid suffered a recovery, and held good. Sed vide *Bagshaw* v. *Spencer*, 1 Vez. 142. 2 Atk. 246. 570. 577. S. C. as to the effect of such a devise for payment of debts.

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tered, and it was against equity to suffer the *cestui que trust* to be barred by non-claim for the laches of his trustee. (1)

Whereupon the *Lord Keeper* decreed the trustee should give leave to the plaintiff to bring an action in his name to try his title; and said it being a title at law, he would not determine it himself; though his opinion was, that the plaintiff was barred. (2)

(1) Vide *Webber* v. *Earl of Montrath*, 9 Mod. 143. *Allen* v. *Sayer*, post 2 vol. 369.

(2) The costs of this suit ordered to the defendant, and plaintiff to enter into recognizance to pay the mesne profits, Reg. Lib. 1683. A. fol. 394. Vide *North* v. *Williams*, 2 Ch. Ca. 63. S. C. nom. *North* v. *Way*, ante 13. *Quære*, If the devise in this case is not a legal estate, executed by the statute of Uses, and not a trust, vide *Popham* v. *Bampfield*, ante 79. And note in the case of *Gore* v. *Gore*, in Chan. and B. R. 2 P. Wms. 28, determined by the certificate of the judges, 26th January, 1733, a term of 500 years devised to trustees for payment of testator's debts and other moneys, was taken not to be as an absolute subsisting term, but only as a security for money, and that it would not prevent the next limitation from taking effect as an executory devise, which it could not do if the devise of the term was to be considered as an absolute subsisting term.

Case 225.

Eodem die.

In Court. Lord Keeper.

PHILLIPS *versus* DUKE of BUCKS.

Eq. Ca. Ab. 18, pl. 10. S. C.

A. articles for the purchase of *B.*'s estate, pretending he bought it for one, whom *B.* was desirous to oblige, but in truth bought it for another, and by that means got the estate at an under value. Equity will not decree an execution of these articles. (1)

THE case was, that Mr. *Phillips* having formerly treated with the *Duke* of *Bucks* for the purchase of the manor of *Sheapeshead* and *Garrowden*, in the county of *Leicester*, and not agreeing upon the price, the treaty was broke off: but to compass this purchase Mr. *Phillips* procured Mr. *Niccoll*, the *Lord Chancellor Nottingham's* Secretary, to negociate this matter for him; and it being pretended to the *Duke* (as was proved in this cause) that this purchase was for the

(1) *Harding* v. *Cox*, Hill. 21 G. 2. *Harding* treated with *Cox* for the lease of a house, and pretended he took it for one *Evans*, a barber, and articles were entered into, *Harding* brought a bill for performance of the articles. *Cox* by his answer alleged, that it was not taken for *Evans*, but for a coffee-house man who lived at the back of the house, and who proposed throwing it into his coffee-room, and suggested that the name of *Evans* was only used as a blind; upon hearing, the defendants failed in their proof, but Lord Chan. *Hardwicke* said, that if they had been able to prove the fraud he would have dismissed the bill with costs, on the authority of this case of *Phillips* and *Duke of Bucks*. Sed vide post not. p. 229.

Lord Chancellor, or for the *Solicitor-General* his son, the *Duke* declared himself willing to oblige any of that family; and said, if the *Lord Chancellor* would please any way to satisfy himself of the value of the estate, he should set his own price. Afterwards Mr. *Niccoll* agreed with *Hemmings*, a land jobber, whom the *Duke* had employed in this affair, to buy this estate for 28,000*l.* And thereupon the *Duke* and Mr. *Niccoll* entered into articles, whereby the *Duke* did mention to grant, bargain and sell this estate to *Niccoll* and his heirs in the present tense: and *Niccoll* covenants to pay 28,000*l.* for this purchase, at such times as were therein mentioned; and both of them sealing each part of the indenture, they were both originals: and *Niccoll* goes immediately, and acknowledges before a *Master* in *Chancery* the deed in his custody, and gets it enrolled. (1)

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The *Duke* afterwards discovering this purchase was in trust for Mr. *Phillips*, looks on himself as ill used in this matter, and refuses to perform the articles, or to execute conveyances: but one article being, that it should be lawful for the purchaser to sue in the *Duke's* name to compel his trustees to convey and his mortgagees to assign to Mr. *Niccoll*: *Phillips* and *Niccoll* exhibit a bill and make the *Duke* a party plaintiff against the trustees and mortgagees, setting forth the articles, and that the purchase was in trust for *Phillips*, and praying the defendants might convey and assign to the plaintiff *Phillips*.

Afterwards the *Duke* upon a motion, affirming that the bill was exhibited in his name without his privity or consent, gets his name struck out of the bill: then Mr. *Phillips* amends his bill, and makes the *Duke* a defendant, and as against him prays an execution of the articles in *specie*. The trustees and mortgagees answer. But the *Duke* stands out to a sequestration; and then the plaintiffs go on against the trustees and mortgagees without the *Duke*, and obtain a decree against them to convey and assign, which the mortgagees afterwards on payment of their money did accordingly. (2)

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(1) If two are parties to a deed, and one acknowledge it before a judge it will bind the other. *Taylor* v. *Jones*, 1 Salk. 389, and a deed may be enrolled without the examination of the party, upon proof by witness, that party delivered it. Godb. 270, cited in *Taylor* v. *Jones*, ub. sup. Sed vide 1 Lord Raymond, 746, S. C. as to copy of enrolment of a deed leading the uses of a fine being received in evidence.

(2) Vide *Downes and Al' Creditors of the Marquis of Donegal* v. *Thomas*,

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Afterwards the *Duke* comes in and answers, and examines his witnesses, and the cause coming on this day regularly to be heard as against him; and the matters aforesaid being made out by proof, and likewise (though but slenderly proved) that the lands were of greater value, and were worth between 35 and 36,000*l.*,

One of the defendants is in contempt, and stands out to a sequestration, and the cause is heard against the other defendants; yet he may come in and answer, and the cause may be heard again as to him.

The *Lord Keeper* declared his opinion, that there had not been fair and open dealing in the managing of this affair; but that the *Duke* appeared to him to have been misinformed and drawn in: and that the *Duke*, having a great value for the *Lord Chancellor* or Mr. *Solicitor*, declared himself willing to part with the estate to either of them for less than he would have done to another: and that being the intention of the agreement, *Lord Keeper* said, he would not in equity carry it into execution for the benefit of a stranger: and said, articles, out of which an equity could be raised for a decree in *specie*, ought to be obtained with all imaginable fairness, and without any mixture tending to surprize or circumvention: and therefore declared, he could not in justice decree these articles to be performed in *specie*; (1) but proposed that if the parties would agree to go before a Master; and if a better purchaser did not come in within six months, Mr. *Phillips* might retain his purchase; but that proposition was disliked on each side. The *Duke* desired the opinion of the court, and Mr. *Phillips* thought he had a good cause at law on his deed inrolled; but offered to submit the matter to the *Lord Keeper* as an arbitrator: (2) but that was declined by the *Duke*; he understanding the court was of opinion for him: and thereupon the *Lord Keeper* pronounced his decree for dismissing the plaintiff's bill: and put this case, that if a man, being about to sell an estate, should be informed by *J. S.* that the vendor's brother desired to be the purchaser, and thereupon the vendor should declare his brother should have a better pennyworth than another person; and he should article with *J. S.* for the sale of it at an under-value; and this purchase should be in truth for a stranger; *Lord Keeper* thought, that equity ought not to decree this purchase; and

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Equity will not decree an execution of articles, unless obtained fairly, and without surprise or circumvention.

7 Ves. 207, as to process against peers and other privileged persons. [*Gregor* v. *Arundel*, 8 Ves. 87.]

(1) Vide *Young* v. *Clerke*, Pre. Ch. 538. *Savage* v. *Taylor*, Forr. 236. *Eyre* v. *Popham*, 1 Bro. Ch. Rep. 95, in not.

(2) Vide *North's* Life of Lord Keeper Guilford.

said, that Mr. *Phillips* had here a person of great honour to deal with, and ought to have carried the matter fair and open with him; but declared, if the bill had been brought in Mr. *Solicitor's name*, and he would have patronized the purchase, the articles must have been decreed, and no one can doubt, but he might have sold it to Mr. *Phillips* the next day: but it was another case, that was now before him. (1)

A co-plaintiff, though but a trustee, cannot be examined as a witness for the other plaintiff. (2)

Note.—In this case Mr. *Niccoll* was Mr. *Phillips's* principal witness to have proved the fairness of the contract and proceeding touching this purchase; but he being a party plaintiff (though Mr. *Phillips* had an order to examine him *de bene esse*) could not be read, but must have been dismissed before he could have become a witness: but if Mr. *Phillips* had made him a defendant to his bill, as he might have done (and then the trust had been upon oath, whereas

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(1) The statement in this report is not correct. It appears from the Register's Book that at the hearing on the 11th Feb. the court respited the judgment, and recommended a compromise to the parties; this not being effected, the cause came on for judgment as to the *Duke of Bucks*, the 3d March following, when it was stated on the part of the plaintiff *Phillips*, that the plaintiffs had obtained a decree against the other defendants, the mortgagees and trustees, and that pursuant to such decree the plaintiff *Phillips* had paid on the 23d Dec. 1682, 15,957*l.* 14*s.* 4*d.* to said mortgagees, according to a report of the Master who was ordered to state and settle the said mortgage debts, and had also at the same time paid the sum of 5,000*l.* to the said trustees, and that the plaintiff *Phillips* was now in possession of the said estate, and that the said Master had, by his report of the 27th Feb. 1683, directed how the remainder of the said purchase-money, with interest at the rate of 5*l. per cent.* ought to be paid and applied; the decree is then stated in the Register's Book in these words. "Whereupon, &c. the court "doth think fit and so order and "decree, that the plaintiff *Phillips* "do pay unto the said defendant "the *Duke of Bucks*, and his wife, "the 1,500*l.* mentioned in the Mas- "ter's Report, of the 27th February "1682-3, as thereby is directed, and "that the defendant the *Duke of* "*Bucks* do make and perfect a good "assurance to the plaintiff *Phillips* of "the said manors and premises by fine "and common recovery, and by deeds "leading the uses of the same to the "plaintiff *Phillips*, and his heirs, and "the said defendant is to procure his "wife, the *Duchess of Bucks* to join "in the levying and executing such "deeds and fine. And upon defend- "ant and his wife making such further "assurance by deed, fine and common "recovery, the plaintiff *Phillips* is "forthwith to pay the residue of his "said purchase-money remaining un- "paid with interest at 5*l. per cent.* as "the Master should direct to defend- "ants *Clayton* and *Wildmeers* the act- "ing trustees of the said Duke, for the "use of the said trust, and it is hereby "referred to the Master to tax the "plaintiff's costs of this suit which are "to be allowed and deducted out of "the plaintiff's said purchase-money "accordingly." Reg. Lib. 1683. B. fol. 258.

(2) Eq. Ca. Ab. 225, pl. 7. *Casey* v. *Beachfield*, Rep. Ch. 411. *Mayor of Colchester* v. ———, 1 P. Wms. 595.

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it was now only alleged in the bill) then Mr. *Niccoll* disclaiming all interest upon oath, might have been a good witness. (1)

Note.—Mr. *Phillips* had not proved the value of the land, as he ought to have done, but would have examined witnesses *vivâ voce* to it, but that would not be received. (2)

Note.—Though the articles were enrolled, and imported a present grant, the legal estate did not thereby pass to *Niccoll*, it being in the mortgagees.

(1) *Windham* v. *Lord Richardson*, 2 Ch. Ca. 214. [and see *Bellew* v. *Russell*, 1 Ba. & Be. 99.]

(2) *Bloxton* v. *Drewitt*, Pre. Ch. 64. [*Lake* v. *Skinner*, 1 J. & W. 15, and cases collected in note, ibid. 18.]

Case 226.

1 *Martii. In Court. Lord Keeper.*

FIELDING *versus* BOUND.

Charitable legacies by the civil law are to be preferred to other legacies.

A MAN by his will having devised several legacies, and amongst others, 40*l.* to a charity; and the Spiritual Court being of opinion that though the estate fell short, and would not satisfy all the legacies, yet that the entire 40*l.* ought to be paid to the charity in the first place, and not in average or proportion with the other legacies, the plaintiff exhibited his bill, setting forth that the estate was deficient and would not satisfy all the legacies, and that the Spiritual Court notwithstanding would compel the plaintiff to pay this 40*l.* for the charity, without having any security to refund.

If the spiritual court gives a preference to charitable legacies, in case of deficiency of assets, this court will not grant an injunction.

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And the plaintiff for that reason now moved for an injunction to the spiritual Court: but it was denied by the **Lord Keeper*, who said the civil law was the law by which legatory matters were to be determined, and that the Spiritual Court had unquestionably the proper jurisdiction thereof;(1) and if by their law there was a preference given to charitable legacies, he had no power to alter the law in that point; and therefore refused to grant any injunction, or to direct security to be given for refunding in case of deficiency of assets. (2)

(1) Vide *Harvey* v. *Aston*, 1 Atk. 379. *Attorney General* v. *Pyle*, ibid. 435. Where Chancery and the Spiritual Court have a concurrent jurisdiction this court will not hinder the Spiritual Court being first possessed of the case from proceeding in it, *Nicholas* v. *Nicholas*, Mich. 1720. Pre. Ch. 546. Et vide *Archer* v. *Mosse*, post 2 vol. 8. *Nelson* v. *Oldfield*, ibid. 76.

(2) Reg. Lib. 1683. A. fol. 311. Sed vide *Jenner* v. *Harper*, arg. Pre.

Ch. 390. *Tate* v. *Austin*, 1 P. Wms. 265. *Masters* v. *Masters*, ibid. 422. *Attorney General* v. *Hudson*, ibid. 674. *Attorney General* v. *Robins*, 2 P. Wms. 25. But in that case a legacy of 3*l.* to the poor of the parish considered as funerals, and not liable to abatement, the court looking upon them as *doles* at the funeral. By these cases it appears to be established that legacies to a charity on deficiency of assets, are to abate in proportion, as well as other pecuniary legacies. And the court will not marshal assets in favour of a charity legacy so as to give it effect out of the personal chattels, it being void so far as it touches any interest in land, *Mogg* v. *Hodges*, 2 Vez. 52. [S. C. 1 Cox, 9.] *Attorney General* v. *Tyndal*, Amb. 614. [S. C. 2 Eden, 207.] *Foster* v. *Blagden*, Amb. 704. *Hillyard* v. *Taylor*, ibid. 713, sic dict. *Middleton* v. *Spicer*, 1 Bro. Ch. Rep. 205. [*Foy* v. *Foy*, 1 Cox, 163. *Ridges* v. *Morrison*, ib. 180. *Attorney-General* v. *Hurst*, 2 Cox, 364.] *Makeham* v. *Hooper*, 4 Bro. Ch. Rep. 153. But the doctrine of marshalling in this respect seems rather to depend upon the authority of the cases than the reason of the thing, ibid.

DE

TERMINO PASCHÆ,

36 *Car. II.* 1684.

IN CURIA CANCELLARIÆ.

BONHAM *versus* NEWCOMB.

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Case 227.

In Court. Lord Keeper.

2 Vent. 364. 2 Ch. Ca. 58. 159. S. C. *Ante Case 6 & 212.*

THIS cause coming on to be heard *de integro* before the *Lord Keeper*, he adhered to his former opinion; that there ought to be no redemption in this case: and principally, because it was proved in the cause, that the intent and design of the mortgagor was to make a settlement by this mortgage, and that he intended a kindness and benefit to the mortgagee, in case he should not think fit to redeem this estate in his lifetime; and that there being an express covenant that the mortgagor might redeem at any time during his life, he thought he could not in equity have been debarred of that privilege: for by a bill to foreclose a man, you shall only bar him of his equitable title, when the estate in law is become forfeited: but where he has a continuing title at law, as in this case an express *proviso*, that he might redeem at any time during life, he thought equity could not debar him of that privilege: and therefore being the mortgagee in

BONHAM v. NEWCOMB.

the present case could not have compelled the mortgagor to redeem, and he might have lived so long, as to have made it an ill bargain; and now, when by a contingency it happens to be a good bargain, there is no reason to raise an equity [233] from thence to take the estate from the mortgagee; especially in this case there being a kindness and benefit intended him by the mortgagor: and therefore reversed the Lord *Nottingham's* decree, and dismissed the original bill for a redemption. (1)

(1) Reg. Lib. 1683. A. fol. 482. And this dismission was afterwards, 1 May, 1689, affirmed in Parl. Journ. House of Lords, 14 vol. Vid. *Bonham* v. *Newcomb*, 2 Vent. 365 and 193.

Case 228.

BRICKER *versus* WHATLEY.

30 *Aprilis. In Court. Lord Keeper.*

Eq. Ca. Ab. 312, pl. 13.

A MAN by his will, after debts and legacies paid, gives all the residue and surplus of his estate to *A. B.* and *C.* and the wife of *C.* equally to be divided amongst them, share and share alike. (1)

Legacies given to *A. B.* and *C.* and the wife of *C.* equally to be divided amongst them.

C. and his wife shall have but one-third.

The only question was, whether *C.* and his wife should be taken as one person, and so have only one-third part of the surplus; or should be taken as two persons, and so be entitled to a moiety. (2)

It was urged, that by the words, *equally to be divided betwixt them*, they took as tenants in common, and not as joint-tenants; and therefore must take as two persons; and that in this case there should be no survivorship; but if the husband died his share should go to his executor, and not to his wife: and by Mr. *Solicitor General*, if lands had been

(1) The words of the will as stated in the Register's Book are as follow: "He gave and bequeathed the rest "and residue, &c. his debts and funeral expences being first paid, in equal "shares between his kinsman, the "plaintiff *Richard Bricker*, the plaintiff *Christian Bricker*, his sister, and "the defendants his cousin *Stephen* "*Whatley*, and *Hester*, his wife, "equally to be divided amongst them." R. L.

(2) *A.* purchases a copyhold, and takes a surrender to himself and his wife and daughter, and their heirs. The husband and wife (as one person) take a moiety by entireties, and the daughter the other moiety, and the husband mortgaging it, and afterwards dying, it was adjudged void for the whole, and no relief in equity, *Back* v. *Andrew*, post 2 vol. 120.

BRICKER v. WHATLEY.

devised in like manner, the husband and wife should take by moieties, and as distinct persons. (1)

But it being proved in the cause, that the wife was only of kin to the testator, and not the husband, the *Lord Keeper* was of opinion, that the husband and wife should have but one-third part; and the rather for that he observed the two *(ands)* in this devise, *viz.* to *A. B.* and *C.* and *W.* his wife: and though a man may devise to ten persons, and add an *(and)* betwixt every person's name, yet it is not natural or usual to add an *(and)* till you come to the last person. (3)

Littleton Sect. 291. (2)

(1) Vide *Green on dem: of Crew* v. *King*, 2 Blackst. 1212.

(2) Et vide Co. Litt. 112 a. and for distinction between joint estate to two before they marry, and after marriage had, Co. Litt. 187 *b.* and cases referred to in not. (2) there.

(3) Reg. Lib. 1683. A. fol. 497.

'RAGGETT & Ux' *versus* CLERKE.

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Case 229.

Eodem die.

In Court. Lord Keeper.

THE bill was brought by an executrix to be relieved against an *occupancy*, and to subject the estate to the payment of debts, pretending a deficiency of assets.

2 Vent. 364, S. C. but stated differently.

It was said for the defendant, that it was not proved in the cause, that there was any deficiency of assets, but if it had, yet this occupancy happening before the Statute of *Frauds* and *Perjuries*, the estate was no wise subjected to the payment of debts: (2) and of that opinion was the *Lord Keeper*, and therefore dismissed the bill: (3) and he cited a case in the *C. B.* in the time of the *Lord Keeper Bridgman*, where the question was between an under lessee for years,

An estate by occupancy not subject to debts before the statute of *Frauds*. (1)

(1) Nor since the statute is it liable to legacies, unless given thereout expressly, nor is it distributable, *Oldham* v. *Pickering*. Salk. 464. [But now by the stat. 14 G. 2. c. 20. s. 9, estates *pur auter vie*, where there is no special occupant, nor any devise thereof, shall go, be applied and distributed in the same manner as the personal estate of the testator or intestate. And see *Ripley* v. *Waterworth*, 7 Ves. 425.]

(2) Where an estate *pur auter vie* was limited to *executors*, it was held to be assets, even before the Statute of Frauds and Perjuries. And so decreed per *Lord Cowper*, Chan. *Duke of Devon* v. *Kinton*, post 2 vol. 720. Et vide stat. 14th Geo. II. cap. 20, sect. 9.

(3) Without costs, Reg. Lib. 1683. B. fol. 508. It appears a bill on the same account had before been exhibited by the now plaintiff's wife, before her intermarriage with the plaintiff, against the now defendant, to which he had answered, pleaded, and demurred, and which at the hearing was dismissed.

RAGGETT v. CLERKE. and a tenant at will, which of them should be the occupant; and it was adjudged for the tenant at will, against the opinion of the *Lord Keeper Bridgman*.

Case 230.

6 *Aprilis.*

In Court.

Lord Keeper.

2 Ch. Rep. 275. S.C.

MASSENBURGH *versus* ASH. (1)

Contingent limitation of a term for years adjudged to be good, the contingency being to happen within the space of 21 years.

Settlement of a term on a marriage in trust for the husband for life, remainder to the first son until 21, and after the first son come to 21, then to such first son for the remainder of the term.

But if the first son die before 21, then to the second and every other son in the same manner; and if no such son, or if all the sons die before 21, then to *J. S.*

A good limitation.

Post Case 250, & 298.

THE Case arose upon a deed, touching the contingent remainder of a term for years: and though there was a will in the case, wherein there was a disposition of the same term; yet it was agreed the will could not alter the deed, but that the case must depend on the deed alone: (2) and as to that the case was thus. A term for years was assigned to trustees in trust for *baron* and *feme* during their lives, and the life of the longer liver of them; and if there should happen to be issue male of their bodies living at the time of the decease of the survivor of them, then in trust, that the eldest son of that marriage should be maintained out of the rents and profits, until he attained his age of 21 years, and then the whole term to be assigned unto him; and in case he should die before the age of 21 years, then in like manner for the * maintenance of the second, third, fourth, and every other son of that marriage, one after another, till one of them should attain the age of 21 years, and then the whole term to be assigned to him: but in case there should be no such issue living at the time of the decease of the survivor of the said *baron* and *feme*; or in case there should be such issue, and they should all die before any one of them attained their age of 21 years, then he limited the term to the plaintiff Sir *William Massenburgh* that was his eldest son and heir by a former venter. *Baron* and *feme* die, and leave a son only, who dies whilst an infant of about five years old.

The question was, whether the remainder over to Sir *William Massenburgh* was good?

In the arguing of this case it was agreed by the counsel, and so declared by the court, that as to the limitation of the trust of a term, it was to be governed and guided by the

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(1) Cited *Maddox* v. *Staines*, 2 P. Wms. 421.

(2) Because as the will was penned the clauses were all bound up with relation to the deed, but if those clauses had been substantive of themselves it would have altered the case, Reg. Lib. 1684. B. fol. 251, at the bottom. Vide *Exell* v. *Wallace*, 2 Vez. 121.

same rules in equity, that the devise of a term is at law, and not to be carried further; (1) and that such limitations or contingent remainders as were good in one case, would be so in the other. *Et è converso.*

2ndly. That the general rule that has hitherto obtained was, that you might limit a term to as many persons as you would, one after another, that were *in esse* at the time of the limitation; and one step further, to a person not *in esse:* but that there could be but one contingent remainder of a term for years.

But the counsel for the plaintiff argued, that where there is a contingent remainder limited upon a contingent remainder, if the first contingency never happens, then the second contingency is good, and shall take place in law: and insisted much on the inconveniences people lie under, whose estates consist in church leases, by reason they have no latitude left by some hard resolutions to make a settlement of their estates, or reasonable provision for their families. That these inconveniences were formerly so far considered in this court, that in such cases they would admit limitations over, which the common law would not then allow; but seeing it done in *Chancery*, the *common law* courts soon followed the example of this court; and enlarged much upon the inconveniences that might often happen, should this remainder be adjudged void: and observed that here was no danger of a perpetuity, being the contingency must of necessity happen within the space of twenty-one years at most after the decease of either the *baron* or *feme:* and this cannot be said to come nearer a perpetuity than almost every settlement of a real estate; for here, if the issue once attains his full age, then the whole term is to be assigned unto him, and he may dispose of it at his pleasure, or otherwise it shall go in a course of administration. And they relied strongly on *Wood* and *Sanders's* case, as a case adjudged in point: and cited the cases of *Cotton* and *Heath*, and *Oakes* and *Chalfont*, &c.

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Rol. 1. Abr. 612. Sect. 3.

On the other side, the defendant's counsel insisted much on that rule in cases of executory devises, that one contingent remainder was good, but a contingency upon a contingency is not to be allowed: and to the case of *Wood* and

2 Cr. 459.

(1) *Philips* v. *Philips*, 1 P. Wms. 35. *Watts* v. *Ball*, ibid. 109. *Bale* v. *Coleman*, ibid. 148. *Attorney-General* v. *Sutton*, ibid. 765. *Duke of Norfolk's* Case, 3 Ch. Ca. 48.

MASSENBURGH v. ASH.

Sanders, they opposed the case of *Child* and *Bailey*, and cited the cases of *Gooring* and *Bickertaffe*, and of *Gibbons* and *Summers* in the *Common Pleas*, and the case of *Warman* and *Seaman* in this court. And urged, that in case that rule were to be broken, which allows only one contingent remainder, there are no bounds set; and no man knows where it will end; for as they may appoint the contingency to happen within the space of twenty one years, so they may enlarge it to thirty years, and from thence to forty; and so on without end.

Lord Keeper thought it a case of great consequence; and for as much as he took the rules in *Chancery* touching the [237] limitations of trusts of terms for years, to be the same with executory devises of terms for years at law, he would have the opinion of the judges before he would determine any thing in this matter, and directed a case should be drawn, as the case stood upon the deed, and that it should be tried in a feigned issue in the Common Pleas. (1)

(1) Vide *Heyward* v. *Rogers*, post 461, and cases cited in note there. *Woodford* v. *Thelluson*, 4 Ves. 227. [11 Ves. 112. 1 New Rep. 357. *Beard* v. *Westcott*, 5 Taunt. 393. 5 B. & A. 801. 1 Turner, 25.]

Case 231.
22 *Aprilis.*
Lord Keeper.

VERE ESSEX, EARL of ARDGLASSE, Plaintiff; HENRY MUSCHAMP, ... Defendant.

Eq.Ca. Ab. 133, pl. 2. 169. (C) pl. 1. 2 Ch. Rep. 266. S.C.

Grant of a rent charge in fee after a dying without issue male set aside for fraud.

Vid. ante Case 70 & 125.

THOMAS Earl of *Ardglasse* for 300*l.* in the year 1675, did grant to the defendant a rent-charge of 300*l. per annum* out of lands in *Ireland*, of 1,000*l.* a-year, to hold to the defendant and his heirs, and to commence from the *first Michaelmas* or *Lady-day* after the earl's death without issue male; with a proviso, that if the earl had any issue male who should attain the age of *twenty-one* years, the grant should be void. Afterwards the earl settled his estate for 300*l.* consideration, to the use of himself for life, remainder in tail to all his issue male, the remainder in tail to the plaintiff his uncle, which was according to a former settlement made by the ancestors of his family, and which earl *Thomas* upon his marriage had barred; and then the plaintiff and earl *Thomas* both brought their bill to be relieved against the grant of the rent-charge, alleging that it was obtained by fraud and prac-

tice, by debauching earl *Thomas* with drink and women, and that the grant was pretended to be only a security for repayment of the money and interest: after which bill brought, the defendant obtained a release of that suit from earl *Thomas*, and the now earl's bill was (earl *Thomas* being dead) to set aside the grant and release upon payment of 300*l.* with interest: and upon the first hearing of this cause before the *Lord Keeper*, though he declared there was a foul practice, yet he doubted it might be too great a violation upon contracts, to set it aside; therefore advised the plaintiff to amend the bill.

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The plaintiff afterwards obtained a re-hearing; and many precedents in the Lord *Elsmere's*, Lord *Bacon's* and Lord *Coventry's* times, and since, were produced, whereby it appeared, that unconscionable bargains, which had been made with young heirs, had been set aside by decree of this court, and it appeared in this case, that at the time of the bargain the earl was very young, and had forsaken his wife and her friends in *Ireland*, and lived here in *London* in riot and debauchery, and for supply of his expences had made this bargain, without the advice of any friends or counsel of his own; but relied wholly on the defendant; and that the consideration was but one year's purchase for a rent-charge in fee, now fallen into possession, and that the contingency of the earl's dying without issue male (upon which the defendant did insist chiefly for his defence) was an artifice of the defendant's (the earl, as appeared in proof, being disabled to get children) and however that contingency might be used as an argument to persuade the earl, that he had the best of the bargain, yet the *Lord Keeper* did not think it likely the defendant would have made it, but in expectation of an unreasonable advantage, and that the earl would in a short time by his vicious debauched course of life destroy himself, (as he did;) and it appeared also, that the defendant was informed by the earl's surgeon, that the earl was not able to get a child, and therefore the contingency was not to be looked upon, as if the earl had been in ordinary circumstances; but as it was in the eye of the defendant, who was his companion in those debaucheries: and it appeared also, that the defendant was solicitous to draw the earl into the like bargains with other people, and that the release was obtained without any consideration, after the settlement on the plaintiff.

Contingency of no avail in case of a fraudulent bargain.

Whereupon (though for the defendant it was insisted that

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it was a just bargain, in regard of the contingency, nor had the defendant any means to recover his money again, and that the bargain was made when the earl was in good health, and was acknowledged three months after in order to be enrolled, and that there was no fraud in obtaining the grant or release), The *Lord Keeper* declared, that the more he heard of the cause, the worse he liked it, and that the Earl of *Ardglasse* being easy, dissolute and necessitous, the defendant in conjunction with his cousin *Deny Muschamp*, who had got another unreasonable bargain from the earl, which had been set aside by this court, had beset the earl, and having got a copy of the settlement from *Muschamp*, who had the original, concealed both from the earl: and that the precedents produced came up to the case, as he thought; and therefore, after some days consideration had, he decreed a re-conveyance or release of the rent-charge, and that the same should be set aside, and a perpetual injunction awarded, upon the plaintiff's paying the defendant 300*l.* and interest.

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And the defendant obtaining a re-hearing afterwards, the *Lord Keeper* upon the re-hearing declared, he was fully satisfied in the decree, and that if he were to die presently, he would make it; and so confirmed it. (1)

Earl of Ardglasse versus *Pitt*. 1685 or 1686.

About a year afterwards, a bill was brought by the plaintiff against *George Pitt*, Esq. (who by the agency of the defendant *Muschamp*, had obtained, for 300*l.* consideration, the like grant from the earl of a rent-charge of 300*l. per annum* drawn exactly *mutatis mutandis* by *Muschamp's* grant,) to be relieved against that grant to *Pitt*, though Mr. *Pitt* insisted he did not transact that affair with the earl him-

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(1) Reg. Lib. 1683. A. fol. 633. 7th July, 1684. But the decree was altered in this respect, *viz.* "That "whereas by the decree it was ordered "that on payment of 300*l.* and interest, "at 6*l. per cent.* to the defendant, he, "the defendant, should convey the "said rent-charge of 300*l. per ann.* "to the plaintiff, it is now upon this "re-hearing decreed, that on such pay-"ment of 300*l.* the said defendant was "not only forthwith to deliver up to "the plaintiff the deed whereby the "rent-charge was granted, to be can-"celled, but also to surrender and "release all his estate and interest to "the plaintiff, by such instrument as "the Master should direct, and that "the plaintiff should hold the lands "and premises in question discharged "of the said rent-charge against the "defendant, his heirs, and assigns, and "all other persons claiming, &c." Note in this case *Lord Keeper* said, that the over-value be it never so great is not of itself sufficient ground to set aside a bargain, or whereupon this court can presume a fraud, R. L. But it is certainly not now so considered, vide cases cited in not. to *Batty* v. *Lloyd*, ante 141. [See also the Cases on this subject, collected in Fonbl. Tr. Eq. Book 1. ch. 2. § 9., to which may be added *Stilwell* v. *Wilkins*, Jacob. 282.]

self, but being told by *Muschamp*, that such a bargain might be had, left it to him to deal therein between them; and pretended utter ignorance of the earl's state of life or condition of health, when the bargain was made, so that he was innocent, and a fair purchaser; which pretence being foreseen, it was charged by the bill particularly, that *Pitt's* method in carrying on the contract by *Muschamp* was a further instance of the fraud, that so, if he were questioned, he might deny his knowledge of the condition of the *earl;* and though indeed the matter of the defendant's ignorance of the earl's condition was all he had to insist on for his defence, more than what *Muschamp* had in his case, yet the *Lord Chancellor Jeffereys*, upon the hearing of this cause, inasmuch as it appeared that *Muschamp* had been Mr. *Pitt's* broker in other unreasonable bargains, declared that it was not to be believed that Mr. *Pitt* would make this bargain without enquiry, and knowledge of the condition of the man he dealt withal; and that therefore Mr. *Pitt's* pretence of not personally knowing the earl, or not treating with him, was not only a further evidence of the fraud; but that he was conscious, he should be questioned, and pretended *that* ignorance, the better to excuse it; and declared *fraus est celare fraudem.* And decreed *Pitt* to release and reconvey upon payment of his 300*l.* and interest, and a perpetual injunction. (1)

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Fraus est celare fraudem.

(1) Mr. *Pitt* appears to have put in a plea which was ordered to stand for an answer, with liberty to except, Reg. Lib. 1683. A. fol. 813. Vide on the doctrine of fraudulent bargains in general, and with heirs, dealing for their expectations, *Batty* v. *Lloyd*, ante 141, above referred to.

GOMAN *versus* SALISBURY.

Case 232.
7 Maii.
In Court.
Lord Keeper.
Eq. Ca. Ab. 22, pl. 15. S. C.
Agreement in writing may be discharged by *parol.*

THE single point of this case was, whether an agreement in writing made since the Statute of *Frauds* and *Perjuries* might be discharged by *parol?* And *Lord Keeper* held it might. And therefore dismissed the bill, which was brought to have the agreement executed in *specie.* (1)

(1) Vide for the old doctrine on parol evidence at law, *Countess of Rutland's* Case, 5 Co. 26 a. But parol admitted in equity, *Legal* v. *Miller*, 2 Vez. 299. *Shelburne* v. *Earl of Inchiquin*, 1 Bro. Ch. Rep. 338. So

parol agreement may be discharged by parol, sic dict. *Gibbons* v. *Caunt*, 4 Ves. 848. So a will in writing might before the Statute of Frauds be revoked by parol, Wentw. Off. Exec. 20.

Case 233. YELVERTON PEYTON and his Wife, SIR JOHN ROBERTS, and NATHANIEL DENHAM . . . . . } Plaintiffs;

9 Maii.

In Court.

Lord Keeper.

and

WILLIAM BLADWELL, Heir and Executor of SIR JOHN BLADWELL, and *Al'*. . . . . } Defendants.

Underhand agreement to defeat an agreement made on marriage set aside as fraudulent.

Sir John Bladwell being executor of plaintiff *Peyton's* mother, and having purchased an estate which belonged to plaintiff's mother, he promised that he would not only settle the said estate on plaintiff, but also other land of 300*l.* a-year, if a convenient match could be found for the plaintiff. Accordingly in 1676, Sir *John* treated a marriage for [241] him with the niece of the plaintiffs, Sir *John Roberts* and *Denham*, and it was agreed betwixt him and Sir *John Roberts* that Sir *John* should give his niece 2,500*l.* portion, to be laid out in lands after his death, and that *Bladwell* should settle lands of the value of 300*l.* a-year, (whereof 200*l. per ann.* should be settled for the jointure) and that he would also settle other lands of the value of 100*l. per ann.* on himself for life, remainder to plaintiff *Yelverton Peyton* and his heirs.

Accordingly by lease and release, 14th and 15th *July*, 1676, Sir *John Bladwell*, in consideration of a bond entered into by Sir *John Roberts* to pay 2,500*l.* after his and his wife's death for the marriage portion, conveyed lands in the county of *Norfolk* which in the conveyance were said to be 300*l.* a-year. And as to 200*l.* a-year thereof, the same were limited for the jointure of the wife of plaintiff *Peyton*, remainder to the heirs males of their two bodies, remainder to *Peyton* in tail, remainder to him in fee. And as to the residue to plaintiff *Peyton* in tail, remainder to him in fee. And Sir *John Bladwell* thereby covenanted, that the jointure lands were 200*l.* a-year; and that within two years then next, he would settle other lands in *Norfolk* of 100*l.* a-year, and worth 1,700*l.* to be sold to the use of himself for life, remainder to plaintiff *Peyton* and his heirs.

After the marriage, Sir *John Bladwell* prevailed on plaintiff *Peyton*, who was very young, on promises of leaving him a greater estate by his will, than he had agreed to settle upon him, and by other insinuations, to execute a writing, whereby Sir *John Bladwell* was to receive the profits of the whole estate, allowing the plaintiff *Peyton* only 120*l.* a-year, and to assign over to him plaintiff *Robert's* bond, (1) and also to release or discharge the agreement for the settling the 100*l. per ann.* on him and his heirs after the death of *Bladwell*.

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The plaintiff's bill was to be relieved against these agreements, which had been extorted from the plaintiff *Peyton*, and to have the jointure made good, the lands settled for the jointure not being of the value of 200*l.* a-year.

After long debate the *Lord Keeper* decreed, that the defendant *Bladwell*, notwithstanding the agreement with plaintiff *Peyton*, should account for all the profits of the estate, which Sir *John Bladwell* had been in possession of under that agreement, over and above the 120*l. per ann.* and the Master was to see what was the value of the jointure lands at the time of the settlement: and the defendant *Bladwell* was decreed to make good so much as the jointure lands fell short of 200*l. per ann.* at the time of the settlement made. And Sir *John Bladwell* having devised some lands by his will to plaintiff *Peyton*, the defendant was decreed to make up those lands 100*l.* a-year, and to settle them on plaintiff *Yelverton Peyton* and his heirs, according to the marriage agreement.

And although it had been strongly insisted by the defendant's counsel, that the agreement being to settle 100*l. per ann.* on *Yelverton Peyton* and his heirs, he had power to release and discharge that agreement; and there was no benefit thereby intended to the wife or issue of that marriage: and in case the settlement had been actually made, it had been in plaintiff *Yelverton's* power to have sold, or given away those lands; the settlement being to be made to him and his heirs after the death of Sir *John Bladwell*, and therefore he might well release the agreement, as to that 100*l. per ann.* and no one could be said to be injured by it, no more than if he had devised away or sold those lands.

Yet the court declared its detestation of such underhand

(1) There was also a bond in the penalty of 3,400*l.* to pay 1,700*l.* or to reconvey the 100*l. per annum*, which was decreed to be delivered up. R. L.

PEYTON v. BLADWELL.

agreements; and that it was a deceit and fraud as to Sir *John Roberts*, who was drawn in to give a great portion with his niece, in expectation of a settlement adequate to it, which by this means is to be frustrated: for though plaintiff *Peyton* could have disposed of the lands which were to have been settled on him and his heirs, yet that is frequently done in many settlements, the father by that means being left at liberty to provide for his younger children, and to reward them most, that behave themselves best: but still there is a benefit intended to the issue of the marriage; and it is part of the consideration, for which the portion was given: and therefore declared this under-hand agreement and release to be fraudulent, and set the same aside, and decreed the agreement to be performed, as to the 100*l. per annum*. (1)

(1) Reg. Lib. 1683. B. fol. 495. And that the bond given by Sir *John Roberts* for payment of the marriage portion, and also a bond in penalty of 4,000*l.* given by Sir *John Bladwell* for performance of the covenant of the deed 14th and 15th July, 1676, which Sir *John Bladwell* had also got from the plaintiff together with the assignment to him from the plaintiff, and all other papers and writings relating to the matters in question should be delivered up by defendant *Bladwell*, vide *Redman* v. *Redman*, post p. 348. and cases there cited. Et vide *Gifford* v. *Gifford*, Michaelmas 1699. Cited Eq. Ca. Ab. 88, pl. 8.

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[244] TERM. S. TRINITATIS,

35 *Car. II.* 1684.

IN CURIA CANCELLARIÆ.

Case 234.

BAXTER *versus* MANNING.

3 *Junii. In Court. Lord Keeper.*

Mortgagee lends more money to the mortgagor on bond.

THE plaintiff makes a mortgage of his estate to the defendant, and afterwards the mortgagee advances and lends more money unto the plaintiff the mortgagor on his bond. The plaintiff brings his bill to redeem. The defendant insists to have his bond debt as well as the mortgage-money paid him.

Per cur'. Although there is no special agreement proved in this case, that the land should stand as a security for the bond debt, yet the mortgagor shall not redeem without paying both. (1)

BAXTER v. MANNING. The mortgagor shall not redeem without paying the bond debt, as well as the mortgage. *Post Case* 236.

(1) Reg. Lib. 1683. A. fol. 730. It was referred to the Master to enquire whether the debts secured in this case by bond were separate or included in the mortgage, and in case they should prove distinct debts then the decree to be as above, and so made 31st January subsequent, Reg. Lib. 1684. A. fol. 252. So the law appears to have been formerly, *Anon.* 3 Salk. 84, pl. 7. 2 Eq. Ca. Ab. 603, pl. 34. *Halling* v. *Kirtland*, 2 Ch. Rep. 361. But it is now otherwise, vide *Shuttleworth* v. *Laycock*, post 245. [*Purefoy* v. *Purefoy*, ante 28.] and cases cited in not. there.

BLETSOW *versus* SAWYER.

Case 235.

4 *Junii.* *In Court.* *Lord Keeper.*

THE case was, a man settles lands to the value of 6*l. per ann.* and more, to the use of himself for life, and after to his wife for life; and further agrees, that she shall hold and enjoy the same until 100*l.* shall be paid by his heir to her executors, administrators or assigns. The feme makes a writing, purporting to be her last will, and thereby disposes of this 100*l.* and dies in the lifetime of her husband.

A man settles land of 6*l. per ann.* to the use of himself for life, then to his wife for life, and agrees she shall hold the land, until 100*l.* shall be paid by his heir to her executors, administrators, or assigns: she by a writing purporting to be her will disposes of this 100*l.* and dies in the life of her husband. A good appointment in equity.

The question was, whether this 100*l.* were well disposed of or appointed by her: and the plaintiff's counsel insisted, that it was not intended she should have any benefit of this 100*l.* unless she should happen to survive her husband, and then she might be capable of disposing of it by will; but dying a *feme covert*, her will was void; and her husband was intitled to the administration.

Per cur'. This will is good, the wife being as to this purpose, *quasi a feme sole*; and without doubt it is a good appointment in equity. (1)

(1) The will, though not good at law as a will yet good in equity as an assignment thereof, and ought to be paid to defendant, though he had not proved the will, and decreed the 100*l.* to be paid with interest, from the death of the husband, it being the intent of the deed of settlement that she should have the disposition thereof; decreed 6th July preceding. The cause was

BLETSOW v. SAWYER.

A *feme covert* in the life of her husband may dispose of money laid up out of her separate maintenance.

2*dly*. That this was but a chattel interest in her; and that she might well dispose of it in her husband's lifetime: and it was said in this case, that where a *feme covert* saves money out of a separate maintenance, she might dispose of it as a *feme sole*; and that there had been several decrees in this court ratifying such dispositions. (1)

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re-heard, and the plaintiff was ordered to elect within a week whether he would proceed at law or in equity, and in case he elected to proceed at law, then his bill to be dismissed with costs, but in default of such election then the former decree to stand confirmed, and plaintiff to pay defendant 40*s*. costs for the day, Reg. Lib. 1683. A. fol. 731. *Gorges* v. *Charey*. Cited *Pridgeon* v. *Pridgeon*, 1 Ch. Ca. 118. *Herbert* v. *Herbert*, Pre. Ch. 44. Sir *Paul Neale's* Case there cited. *Henley* v. *Phillips*, 2 Atk. Rep. 48. *Ross* v. *Ewer*, 3 Atk. 160. and cases cited in note there. But as to the principal case it appears to have been afterwards re-heard by *Lord Keeper Somers*, and held that the will was not good, wife dying in the life-time of the husband, vide post 2 vol. 329.

(1) *Gore* v. *Knight*, Pre. Ch. 255, and post 2 vol. 535. Eq. Ca. Ab. 66, pl. 4. *Slanning* v. *Style*, 3 P. Wms. 338. *Fettiplace* v. *Gorges*, 1 Ves. jun. 48. So wife divorced *a mensâ et thoro*, having alimony, entitled to costs on action for defamation or other injury, and husband cannot release them to bind the wife, *Chamberlain* v. *Hewson*, 1 Salk. 115.

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Case 236.

7 Junii. In Court. Lord Keeper.

SHUTTLEWORTH *versus* LAYCOCK.

Mortgagee lends more money to the mortgagor on bond; his heir shall not redeem without paying off the bond, as well as the mortgage, in case the heir is bound.

WHERE there is a debt secured by mortgage, and also a bond debt; when the heir of the mortgagor comes to redeem, he shall not redeem the mortgage without paying the bond debt too, in case the heir be bound: (1) so if there are two

Ante Case 234. Where a man has two mortgages, and one is defective, if the heir will redeem, he shall take both. 2 Ch. Rep. 23.

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(1) So *Anon*. 2 Ch. Ca. 164, and the ground is to prevent circuity of action, the bond of the ancestor wherein the heir is bound becoming upon the death of the ancestor, the heir's own debt. So in the case of executor where mortgage of term for years and bond debt, *Anon*. post 2 vol. 177. *Eccles* v. *Thawill*, Pre. Ch. 18. *Coleman* v. *Winch*, 1 P. Wms. 776. So a devisee of the mortgaged premises since the statute of fraudulent devises, *Heams* v. *Bance*, 3 Atk. 630. *Challis* v. *Casborne*, Pre. Ch. 407., cited in not. to *Coleman* v. *Winch*, ub. sup. *Price & Ux.* v. *Fastnedge*, Amb. 686. So as to simple contract debts, *Demandray* v. *Metcalf*, Pre. Ch. 419. post 2 vol. 691. *Vanderzee* v. *Willis*, 3 Bro. Ch. Rep. 21. But if the heir assign the equity of redemption the assignee shall redeem the land without paying the bond, *Bayly* v. *Robson*, Pre. Ch. 89. *Coleman* v. *Winch*, 1 P. Wms. 775. Pre. Ch. 511, S. C. *Troughton* v. *Troughton*, 1 Ves. 87. *Morrett* v. *Paske*, 2 Atk.

mortgages, and one is defective, if he will redeem, he must take both. (1)

SHUTTLEWORTH v. LAYCOCK.

53. *Powis* v. *Corbet*, 3 Atk. 556, recognised in *Adams* v. *Claxton*, 6 Ves. 229. So it is as to mortgagor himself, and as to creditors of testator, *Coleman* v. *Winch*, ub. sup. *Anon.* 2 Vez. 662. (Note, the name of that case is *Jackson* v. *Langford*, July 21, 1755. Reg. Lib. A. 1754.) *Heums* v. *Bance*, 3 Atk. 630. which was the case of a trust for the benefit of creditors. *Lowthian* v. *Hassel*, 3 Bro. Ch. Rep. 162. *Jones* v. *Smith*, 2 Ves. jun. 377. So in case of mortgage of copyhold and judgment, the judgment shall not be tacked against the heir, copyholds not being liable to execution upon judgment, *Cannon* v. *Pack*, 2 Eq. Ca. Ab. 226. Vin. Ab. 6, 222, pl. 6. Powell's Law of Mortgages, 397, 400, et seq.

(1) This was a bill to redeem on payment of mortgage money. In this case the mortgagee received the rents and profits, and it being understood between him and the mortgagor that the money due upon the mortgage, together with that lent to the mortgagor on bond, amounted to the full value of the premises, mortgagee had built thereon, and then made his will and devised all his estates, &c. in *Leeds*, and all his estate interest and demand therein, and the money arising or growing due upon the redemption of such part as was mortgaged and should be redeemed, to defendants and their heirs. The decree was made on the offer of plaintiff to release his equity of redemption, Reg. Lib. 1683. B. fol. 553.

BEACHINALL *versus* BEACHINALL.

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Case 237.

5 *Junii.* *In Court.* *Lord Keeper.*

THE bill was to be relieved touching a marriage agreement. Upon the marriage there was a deed executed, which imported to be a settlement made in pursuance of the marriage agreement; but at the hearing there was strong proof by *three* or *four* witnesses, that this deed was not drawn according to the agreement; but that the agreement was for settling more lands of far greater value, and to other uses.

Settlement being alleged to be made in pursuance of a marriage agreement, a trial was directed to try what was the marriage agreement, but ordered the settlement should not be given in evidence.

The cause was heard by the *Lord Chancellor Nottingham*, who directed the agreement to be tried at law, and the deed to be left out of the case, and not given in evidence.

In a bill of *review* the error assigned was, because by this decree they were not permitted to give the deed in evidence: and for that reason the *Lord Keeper* reversed the decree; saying, it was a strange order to take away a man's evidence, and then send him to law. (1)

On a bill of review the last part of the order reversed.

(1) Plea and demurrer to the bill of review over-ruled, and the cause ordered to be re-heard, notwithstanding the inrolment of the decree and dismis-

sion, and the five marks deposited with the Register before the bill of review by the plaintiff to be re-paid to him, Reg. Lib. 1683. A. fol. 731. An order was afterwards obtained for re-hearing the cause, the first day of causes and exceptions after term, R. L. fol. 590. But no entry appears afterwards. There are several entries in a cause between the same parties where the plaintiffs appear to sue *in formâ pauperis*, and which end in the bill being dismissed, Reg. Lib. 1686. A. fol. 8. Entered in the name of *Beachinall* v. *Arnold*. And in *Uvedale* v. *Halfpenny*, 2 P. Wms. 151, the court altered the settlement according to the agreement, as expressing the intention of the parties, et vide the cases cited in not. there. And there is a class of late cases determined upon the principle that the court will enquire into the original intention of the parties, and shape the settlement accordingly, *Randall* v. *Willis*, 5 Ves. 262. *Barstow* v. *Kilvington*, ibid. 593. *Clough* v. *Clough*, ibid. 710. And that the court will also take into consideration what under the circumstances ought to be the intention of the parties, *Howell* v. *Howell*, 2 Vez. 358. *Partyn* v. *Roberts*, Amb. 315. *Clough* v. *Clough*, ub. sup. *Brudenell* v. *Elwes*, 7 Ves. 382. In the foregoing cases, and the cases cited in them the ground on which the intention has been inferred is either a comparison of the settlement with the articles or the interpretation of the settlement or articles alone, by what evidently appears on the face of them, except that in the case of *Barstow* v. *Kilvington*, a letter, and in the case of *Jenkins* v. *Quinchant*, cited in not. there, instructions for drawing the settlement in the form of a letter were admitted as evidence of the intention of the parties. [See also *Northumberland* v. *Egremont*, 1 Eden, 435. *Doran* v. *Ross*, 3 Bro. Cha. Rep. 27. 1 Ves. jun. 57. *Payne* v. *Collier*, 1 Ves. jun. 170. *Hope* v. *Clifden*, 6 Ves. 499. *Burrell* v. *Crutchley*, 15 Ves. 544. *Hume* v. *Rundell*, 2 S. & S. 174.] For the ground on which courts of equity refer to articles in construing and reforming marriage settlements, vide *Legg* v. *Goldwire*, Forr. 20. Fearne Cont. Rem. 138, et seq. 5th edit.

Case 238. TREVANIAN *versus* MOSSE.

Eodem die. *In Court.* *Lord Keeper.*

Eq. Ca. Ab. 38. pl. 10. S. C.

A PLEA of a purchase for a valuable consideration overruled, because the defendant did not allege *seisin* and *possession* in the person, from whom he bought. (1)

Plea of a purchase for a valuable consideration must allege *seisin* and *possession* in the vendor.

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(1) Vide *Lady Bodmin* v. *Vandenbendy*, ante, 179. *Head* v. *Egerton*, 3 P. Wms. 281. [*Strode* v. *Blackburn*, 3 Ves. 226. *Wallwyn* v. *Lee*, 9 Ves. 32. *Daniels* v. *Davison*, 16 Ves. 252.]

FANSHAW *versus* FANSHAW.

Case 239.

Eodem die.
In Court.
Lord Keeper.

Eq. Ca. Ab. 37, pl. 6. S. C.

Plea of privilege by some of the defendants not good, if there is another defendant not privileged. 2 Ro. 274. G. 1.

Two of the defendants, being the officers of the *Exchequer*, plead the privilege of the *Exchequer*. Plea over-ruled, because there was a third defendant, who had no right of privilege. (1)

(1) With costs, 5 marks, Reg. Lib. 1683. A. fol. 589. *Powle's* Case, Dyer Rep. 377. So *Molyn* v. *Cook & Al'*, 1 Vent. 298. *Townshend* v. *Duppa*, Str. 610. *Sed quære* whether the action may be severed, Vin. Ab. 521, pl. 4, 5.

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BONSEY *versus* LEE.

Case 240.

Eodem die.
In Court.

3 Lev. 72. S. C.

Impropriator of the small tythes bound to maintain a priest, where there is no vicarage endowed.

And in such case the king may assign to the curate such proportion of the small tythes, as he thinks fit. Otherwise where there is an endowment, though never so small.

WHERE there is no vicarage endowed, the impropriator of the small tythes is bound to maintain a priest; (1) and upon an information by the *Attorney-General* for that purpose, the *King* may assign to the curate such an allowance or proportion of the small tythes, as he shall think fit; but otherwise it is, where the *Vicar* is endowed, though but of never so small a matter. The case of the *King* and *Sutton* in the *King's Bench* was cited. (2)

(1) But has not the nomination of the vicar, per *Lord Nottingham*, Chan. *Mallet* v. *Trigg*, ante 42.

(2) The bill in this case was by a plaintiff claiming a rectory formerly belonging to the dissolved priory of *Newark*, and to which the chapel vicarage house and small tythes in question were annexed, and that the same might be settled and established upon a minister in holy orders. To this bill the defendant pleaded purchase for valuable consideration, and divers proceedings in this court, and the court of exchequer, whereby the right is vested and confirmed in him, and that he and those under whom he claimed had been in possession above 30 years, this plea was over-ruled, and the defendant ordered to answer, but he offered to settle the small tythes on a licensed minister appointed by the bishop and his successors for ever; and also the vicarage-house, taking back a lease of the house for 60 years, at the yearly rent of 1*s.* and the plaintiffs were to give their answer within a week: Reg. Lib. 1683. A. fol. 623. It does not appear again.

Case 241.
5 *Junii.*
In Court. Lord Keeper.
Eq. Ca. Ab. 13, pl. 2. S. C. *Ante Case* 56. & 175.

GODFREY *versus* TURNER.

DEMURRER; because the plaintiff hath not made oath of the loss of his deed.

In what case a plaintiff must make oath of the loss of a deed, where a bill is brought touching such deed.

Per cur'. Where you come only for discovery of the deed, you need not make oath of the loss of it, as you must do, when you come for relief; for you shall not translate the jurisdiction without oath made of the loss of the deed.(1)

(1) Et vide *Nicholson* v. *Pattison*, post 310.

Case 242.
7 *Junii.*
In Court. Lord Keeper.

GIBSON *versus* SCEVENGTON.

Whether bill taken *pro confesso* after defendant's appearance and sequestration returned.

THE defendant having appeared, and afterwards stood in contempt, until a sequestration was returned, it was insisted by the plaintiff's counsel, that the bill ought to be taken against the defendant *pro confesso*: and cited two precedents, where it had been so done; and said, it was no more than a judgment by default at law.

But the *Lord Keeper* would consider of it, till the next term. (1)

Otherwise, where baron and feme are defendants, and the wife only appears.

Sequestrators on mesne process accountable for the profits, and can retain only so far as to satisfy for the contempts.

And it being alleged, that *baron* and *feme* were defendants, and that it was the wife only who had appeared, and that without the husband's privity; the *Lord Keeper* referred it to a Master to examine that fact, and said, if it should fall out to be so, he could not decree against the husband: but they must proceed, and lay on the sequestration to bring him in: (2) which the plaintiff's counsel said, was but a sorry remedy, in regard that sequestrators upon mesne process were accountable for all the profits, and could retain only so far as to satify for the contempts. (3)

(1) Vide *Johnson* v. *Desmineere*, ante 223. *Hawkins* v. *Crook*, 2. P. Wms. 556.

(2) Vide *Lord Ward* v. *Lord Meath*, 2 Ch. Ca. 173.

(3) And this sort of sequestration determines by the death of the party, *Burdett* v. *Rockley*, ante 58.

ATTORNEY-GENERAL *versus* BAXTER.

Case 243.

Eodem die.

In Court. Lord Keeper.

Eq. Ca. Ab. 96, pl. 9. S. C.

A. by will in 1676, gives 600*l.* to Mr. *Baxter* to be distributed amongst 60 ejected ministers.

Upon an information by the *Attorney-General*, decreed the charity to be void, and the money to be applied for maintenance of a chaplain for *Chelsea* College.

Robert Mayot, who was a beneficed clergyman of the *Church of England*, by his last will, 12th *October*, 1676, bequeathed 600*l.* to Mr. *Baxter* to be distributed by him, amongst 60 *pious ejected Ministers*, and adds, I would not have my charity misunderstood: I do not give it them for the sake of their non-conformity: but because I know many of them to be pious and good men, and in great want. He also gave Mr. *Baxter* 20*l.* and 20*l.* more to be laid out in a book of his, entitled, *Baxter's Call to the Unconverted.*

Upon this will Mr. *Attorney-General* exhibited an information, wherein he alleges this charity to be against law, and that therefore the right of applying this money was in the *King*; and that his *Majesty* had declared his pleasure to be, that this 600*l.* should go towards the building of *Chelsea* College.

Mr. *Baxter* in his answer stated the controversy between the *conformists* and *dissenters*, and showed upon how small a matter some, that conformed in all other points, were kept out of the pale of the church, and ejected from their livings: and then swore himself a conformist, and that he knew many poor pious and ejected ministers, that were in great want, and forced to undertake servile employments for their livelihood: and that he accepted of the trust reposed in him by his testator, and intended, as soon as he could get this money of the executors, to distribute it according to his testator's intention amongst poor ejected ministers, who he supposed were not disabled by law from taking of a legacy; and said, he did not believe the testator had any design against the government; being very conformable to the church, and one whom he never saw; and that the testator was very charitable, and sets out many excellent charities of his in his lifetime, that were legal and allowed: and as for the book mentioned in the testator's will; it was, he hoped, not condemnable, nor ever condemned; but had been printed *two and twenty* times, and licensed, &c. and hoped the doctrine and disposition of the dissenters, merely as ejected ministers, was not so bad, as to forfeit all charities; his *Majesty* having in his declaration declared in these words, *viz. We must for the*

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ATTORNEY GENERAL v. BAXTER.

honour of all of either persuasion, with whom we have conferred, declare, that the desires of all for the advancement of piety were the same; their zeal for the church the same; they all approve the episcopacy and a liturgy in a set form; and if on such excellent foundations any such structure should be for lessening the gift of charity, a vital part of the christian religion, we shall think ourselves unfortunate, and defective in the administration of government God hath intrusted us with, &c. and Mr. *Baxter* said further, he thought his *Majesty* was not mistaken; and that not only religion, but humanity binds men to pity those who spent their lives in studying to know God's will, and yet by mistake in some opinions are fallen into want; and therefore owned his dissent against resigning other men's sustenance, and hoped the court would not misconstrue that act of charity.

The *Attorney* and *Solicitor-General*, &c. argued, that this was a devise to the 60 ejected ministers, *eo nomine*, as they
[250] were dissenters: and to suffer them to take by such a devise was almost to make a corporation of them, and it would certainly encourage and keep up a perpetual schism in the church, which the law would not endure.

For the defendant it was argued, that this was a good bequest, and that dissenters were not disabled from taking a legacy. Any devise, though to a superstitious use, was good at common law; and it would not be pretended, that this devise was within any of the statutes of Superstitious Uses. The devise was made by a conformist, who had he or a dissenter given 10*l.* a-piece to 60 dissenters by name, there would not be the least pretence to make that legacy void: and what has the testator done here? He has deputed Mr. *Baxter* to name the 60 persons for whom the charity was designed; and what law has disabled him from executing this power of nomination, though he had been a dissenter? But he by his answer has approved himself one of the Church of *England:* and it was said, there could be nothing of weight in the objection, that such bequests would keep up a schism in the church; in regard here was nothing durable; no land, no rent, no annuity given, only one gross sum of 10*l.* to a man, which would only buy bread for his family for a very little while; but if that was a real mischief, yet to damn this charity, would be no remedy to the evil, for it would but teach the dissenters for the future to name the parties, or to dispose of their charities in their life-times; and in that case the dissenters will only have a better opportunity of

drawing out and extending their donors' charities: and it was observed, that the bequest was to *poor ejected ministers*, now there are many ejected for want of titles, and are fit objects of charity. ATTORNEY-GENERAL v. BAXTER.

The *Lord Keeper* told Mr. *Attorney*, that causes of this moment ought not to be brought before him but in term time, when he might have the assistance of the *Judges:* but however being he had now heard the matter, and was not doubtful in the case, he would not defer making his decree: and [251] adjudged the charity (that is the use) to be void, and that the money should be applied for building of *Chelsea* College. (1)

Then it was urged, that if the charity was void, the money ought to remain with the executor: but the court said, there was a difference between the charity and the use; and that the use was void, and not the charity.

Then it was observed to the court, that the practice had always been to apply charities *in eodem genere*, and this being intended for ejected ministers, ought to go amongst the clergy. (2)

Note.—This decree was reversed by the *Lords Commissioners* in *Trinity* Term, 1689, and the 600*l.* which had been brought into court, ordered to be paid out and distributed according to the will.

And thereupon the *Lord Keeper* decreed it for the maintenance of a chaplain for *Chelsea* College.

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(1) As to the right of the crown to appoint, vide *Attorney-General* v. *Guise*, post 2 vol. 266. *Attorney-General* v. *Syderfen*, ante 224, and cases there cited. The *King* v. *Lady Portington*, 1 Salk. 162. *Attorney-General* v. *Lamb*, in Chan. Hil. 11 Geo. II. 1737. *De Costa* and *De Paz*, Amb. Rep. 228. *Attorney-General* v. *Whorewood*, 1 Vez. 537. *Attorney-General* v. *Cock*, 2 Vez. 273. *Corbyn* v. *French*, 4 Ves. 433. in not. and *Moggridge* and *Thackwell*, on a re-hearing, 7 Ves. 36. In page 86 of which report, *Lord Eldon*, Chan. says, "the general principle thought most reconcileable to "the cases is, that where there is a "general indefinite purpose not fixing "itself upon any object, the disposition is in the King by sign manual, "but where the execution is to be by "a trustee with general or some objects pointed out, there the court "will take the administration of the "trust."

(2) On the doctrine of *cy pres* vide *Attorney-General* v. *Boultbee*, 2 Ves. jun. 380. 3 Ves. 220. S. C. *Attorney-General* v. *Whitchurch*, 3 Ves. 141. *Attorney-General* v. *Andrew*, ibid. 633. *Attorney-General* v. *Bowyer*, ibid. 714. 5 Ves. 300. S. C. *Attorney-General* v. *Minshull*, 4 Ves. 14. *Corbyn* v. *French*, ibid. 433. in not. et vide Bac. Abr. 1. 581. (D) [*Attorney-General* v. *Wansey*, 15 Ves. 231.] and see the decree in the principal case reversed *Attorney-General* v. *Hughes*, post 2 vol. 105.

Case 244. CHURCHILL *versus* LADY SPEAKE.

Eq.Ca.Ab. 286, pl. 1. S. C.

A. gives a legacy to his grand-daughter, an infant, to be paid at such time and in such manner as his wife, who was his executrix, should think fit and best for his grand-daughter. The executrix lived near twenty years after the death of *A.* and died without paying the legacy.

THE case was, that one *Prideaux*, the plaintiff's grandfather, and father of Sir *John Churchill's* wife, being (amongst other things) possessed of and intitled to a mortgage for 1,000*l.* gave this mortgage, (amongst other things) to his wife, willing her to give 500*l.* of it to the plaintiff his grand-daughter (Sir *John Churchill's* eldest daughter); *but as to the time when, and manner of giving it, he left it to his wife's discretion, as she should think fit, and best for his said grand-daughter.* (1) And having thus made his will, he died about 1664, the plaintiff his grand-daughter being then an infant of about nine years old. (2)

Decreed the legacy to be paid, with interest from the death of *A.* though no demand made in the life of the executrix.

Mrs. *Prideaux*, the plaintiff's grandmother, lived till 1683, and then died, making the defendant the Lady *Speake* her executrix, having paid no part of this 500*l.* neither was the same in all that time so much as demanded of her: and the plaintiff's bill was to have this legacy of 500*l.* given unto her by her grandfather, paid with interest.

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And the *Lord Keeper*, notwithstanding there was not any demand proved, and though Mr. *Prideaux* left the time and manner of paying this 500*l.* to his wife, decreed the 500*l.* with interest from the death of *Prideaux* the grandfather, being near twenty years. (3)

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(1) The words of the devise are in a clause separate from that which gives the 1,000*l.* and are as follow: "I desire my wife, out of the money I "have bequeathed unto her, that she "will give unto my grandchild *Mar*"*garet Churchill*, the sum of 500*l.* "but for the time and manner of "doing it I leave it freely to herself, "and as she shall see it best for her." R. L.

(2) The date of the will was, 1 April, 1659, and the testator shortly after the making thereof died, the plaintiff being then not above two years old.

(3) The court being fully satisfied that the nature of this case was a trust in *Margaret* the grandmother, for the benefit of the plaintiff. Reg. Lib. 1683. A. fol. 572. *Slaning's* Case, Pop. 102. *Fringe* v. *Lewis's* Case, 1 Leon. 17. *Knap* v. *Powell*, Pre. Ch. 11. But where legacy payable at a day certain, shall only carry interest from the time demanded, *Jolliffe* v. *Crew*, Pre. Ch. 161. Contra, *Smell* v. *Dee*, 2 Salk. 415. *Palmer* v. *Trevor*, post 262. Eq. Ca. Ab. 286. 301. *Symes* v. *Vernon*, post 2 vol. 553. [And the rule at present is, that a legacy payable at a day certain shall carry interest from that day, and a legacy given generally (if out of personal estate) from the end of a year after the testator's death, without any demand. See Fonbl. Tr. Eq. Book 5. ch. 1. § 3.] So where legacy given generally, and infant legatee, interest after the year from testator's death, *Jolliffe* v. *Crew*. *Smell* v. *Dee*, ub. sup. So in all cases

unless otherwise directed, *Gibson* v. *Bott*, 7 Ves. 97. Where legacy charged on land or a fund yielding immediate profit, and no day of payment mentioned, interest from death of testator; [so, as to legacy charged on land, *Spurway* v. *Glynn*, 9 Ves. 483. *Shirt* v. *Westby*, 16 Ves. 393. *Davies* v. *Davies*, Dan. 84. But contra as to legacy out of a *personal* fund, though yielding profit, *Pearson* v. *Pearson*, 1 Sch. & L. 11. *Gibson* v. *Bott*, 7 Ves. 97. *Webster* v. *Hale*, 8 Ves. 412.] otherwise from the year after testator's death, *Bilson* v. *Saunders*, Bun. 240. *Maxwell* v. *Wettenhall*, 2 P. Wms. 26. *Lloyd* v. *Williams*, 2 Atk. 109. *Beckford* v. *Tobin*, 1 Vez. 310. But where the legacy made payable at twenty-one, if legatee attain that age, and not otherwise, no interest allowed, nor the principal secured till twenty-one, *Palmer* v. *Mason*, 1 Atk. 505. *Atkinson* v. *Turner*, 2 Atk. 41. *Haughton* v. *Harrison*, ibid. 330. *Heath* v. *Perry*, 3 Atk. 101-2. If legacy given on a contingency with a devise over, and the contingency do not happen the interest to go with the residue, *Butler* v. *Butler*, 3 Atk. 58. *Trevanion* v. *Vivian*, 2 Vez. 430. *Hawkins* v. *Combe*, 1 Bro. Ch. Rep. 335. *Wyndham* v. *Wyndham*, 3 Bro. Ch. Rep. 58. *Shawe* v. *Cunliffe*, 4 Bro. Ch. Rep. 144. And where a bequest of a residue to an infant by way of present gift, and over in case of death under twenty-one, the interest in the mean time shall be paid, and only the capital go over, *Tissen* v. *Tissen*, 1 P. Wms. 500. *Shepherd* v. *Ingram*, Amb. 448. *Nicholls* v. *Osborn*, 2 P. Wms. 418. *Chaworth* v. *Hooper*, 1 Bro. Ch. Rep. 82, being in the nature of a present absolute bequest defeasible on the happening of a certain event, viz. dying before twenty-one. But a distinction was taken by *Thurlow*, Chancellor, in *Descrambes* v. *Tomkins*, [1 Cox, 133.] cited in *Shaw* v. *Cunliffe*, 4 Bro. Ch. Rep. 150. between a bequest of the nature last mentioned, and a future gift, e. g. to be paid at twenty-one, with a devise over in case of legatee dying before twenty-one, in which case interest not allowed; and it appears indeed to be a general rule that a legacy payable in future shall not carry interest till time of payment, and applies to infant legatees: the exceptions to the rule are as follow; parent and child, a residue, and when from special circumstances (e. g. a view on the part of the testator to the condition of the legatee) an intention to give interest clearly appears, *Tyrrell* v. *Tyrrell*, 4 Ves. 1. in which case the rule, as applied to infants was acknowledged, but rather submitted to than approved. [See the exceptions to this rule more fully stated, and the cases collected in note (*y*) to *Harvey* v. *Harvey*, 2 P. Wms. 22.] And representative of infant legatee of vested legacy dying before twenty-one, shall take immediately, if interest directed, if not, must wait till legatee would have attained twenty-one, for the principal, and then no interest, *Crickett* v. *Dolby*, 3 Ves. 13. [and see *Laundy* v. *Williams*, 2 P. Wms. 478.] As to the rate of interest a distinction seems formerly to have prevailed between legacies or portions charged on land, and on personal estate, and no rate of interest mentioned in the will; in the former case no more than 4*l. per cent.* or one *per cent.* less than the legal interest given; in the latter, the legal interest, *Swynfen* v. *Scawen*, 1 Vez. 100. *Bryant* v. *Speke*, ibid. 171. *Moore* v. *Moore*, on a re-hearing, 3 Atk. 402. Sed vide *Guillam* v. *Holland*, 2 Atk. 343. *Wood* v. *Briant*, ibid. 523. which was the case of a portion given by a father to his child, who was entitled to the residue of her grandmother's estate, and only 4*l. per cent.* allowed, but 4*l. per cent.* is now clearly the general rule of the court in all cases, *Lewis* v. *Freke*, 2 Ves. jun. 511. which however was the case of a power to charge, and 5*l. per cent.* charged. *Sitwell* v. *Barnard*, 6 Ves. 543.

DE

TERM. S. MICHAELIS,

36 *Car. II.* 1684.

IN CURIA CANCELLARIÆ.

Case 245.

16 *Octobris.*

In Court.
Lord Keeper.

Eq.Ca.Ab.233, pl. 5. S. C.

If one of the parties after publication passed has an order to examine upon the usual affidavit, the other party may not only cross-examine, but examine at large.

ANONIMOUS.

UPON a motion for leave to examine after publication, upon making the usual oath of not having seen the depositions; the *Lord Keeper* declared, that in such a case the other side should be at liberty to examine at large, as well as to cross-examine the witnesses produced by the party that made the motion (which was all he might do formerly); and his reason was, that a crafty solicitor may lie in the lurch, and examine nothing till after publication is past: and the other party may think himself secure, and so not examine to those points, which he could otherwise have proved, in regard he finds his adversary has not examined to those matters: and when once publication is past, and the party that examined has seen his own depositions; then the side that lay still having tied up his adversary, so that he can only cross-examine the other's witnesses, applies for an order upon the usual affidavit to enlarge publication, and when he has got that order, then he comes in with a whole cloud of witnesses: and though it may be thought hard, that any one should have liberty to examine, after he has seen the depositions; yet his *Lordship* thought it a reasonable penalty on such, as would not examine in time; or that should lie upon the catch to take advantage of the other party; and ordered the register to take notice of it as a fixed rule for the future. (1)

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(1) And where the defendant after publication examined a witness, and then conceiving himself irregular on the usual affidavit got an order to re-examine, and the witness died before re-examination, the defendant may make use of the first depositions, *Copeland* v. *Stanton*, 1 P. Wms. 414. So where bill by husband and wife, and witnesses examined and publication passes, on the death of the husband, and new bill for the same matter by second hus-

band, same witnesses may be examined, *Anon.* post 2 vol. 197. Secus where by the death of husband no abatement, and the wife's inheritance not in the case, *Shelberry* v. *Briggs* and *Al'*, post 2 vol. 249. Et secus in a bill brought to have the benefit of a former decree, *Johnson* and *Ux.* v. *Sir E. Northey*, ibid. 409. Et vide where under the circumstances a new set of interrogatories were allowed to be settled before the Master after publication, the former being suppressed as leading, *Spencer* v. *Allen*, Pre. Ch. 493.

CORPORATION de SUTTON COLDFIELD *versus* WILSON.

Case 246.
24 *Octobris.*
In Court.
Lord Keeper.
Eq. Ca. Ab. 225, pl. 11. S. C.
Whether a member of a corporation may be a witness for the corporation.

THE question being, whether a bond of 400*l.* penalty was intended for the benefit of the *corporation* or of the defendant, and the witnesses for the plaintiff being all members of the *corporation*, it was objected that they could not be read, they swearing for their own benefit: which exception was allowed as good: (1) and the *Lord Keeper* said, that a *corporation* ought to have a town-clerk and under-clerks that are not freemen, that they may be competent witnesses upon occasion: and he said he thought it very hard in the case of the *waterbailage* of *London*, that no one freeman of the city, though it was not six-pence concern to him, could be admitted as a witness: but there indeed the fee was in question; and here being only a bare sum of 200*l.* in dispute, he thought that not considerable enough to take off a man's testimony; (2) and said it was usual, where a man was a legatee, if it was an inconsiderable legacy, as 5*s.* (or 5*l.* to a man of quality) that he should nevertheless be a witness to prove the will. (3)

(1) If a corporation will examine any of their members as witnesses they must (and so is the course) disfranchise them, *Mayor and Aldermen of Colchester* v.———, 1 P. Wms. 595.

(2) But the cases where the party is concerned in interest, though never so small, have always prevailed. *Dodswell* v. *Nott*, post 2 vol. 318. So parishioners no good evidence to prove a charity given to a parish, *Attorney-General* v. *Wyburgh* and *Al'*, 1 P. Wms. 599. Secus, if only a lodger, and one that does not pay to the poor, ibid. And so is the common case upon an appeal from a rate at the quarter sessions.

(3) Vide *Anstey* v. *Downing*, Stra. 1253. And now it is established that legatees and devisees of land are in all cases to be witnesses competent to prove a will, but that the legacy or devise shall be void, stat. 25 Geo. II. cap. 6., and that creditors are fully competent even though the land be charged with the payment of debts, vide *Wyndham* v. *Chetwynd*, 1 Burr. Rep. 427. 2 Bl. Comm. cap. 23, p. 377. Et vide *Baugh* v. *Holloway*, 1 P. Wms. 557, and note there. *Pyke* v. *Crouch*, 1 Raym. 730. Lord *Camden* in his argument in the case of *Doe* on dem. of *Henman* v. *Hersey*, Hil. 1760, inclined to think that this practice ceased on the passing the statute of Frauds.

CORPORATION DE SUTTON COLDFIELD v. WILSON.

At length it appearing, that the defendant had cross-examined some of the plaintiff's witnesses not only to questions, barely whether they were of the corporation or not, but to other questions which tended to the merits of the cause; the *Lord Keeper* declared, *that* made them good witnesses, though they were members of the *corporation*, and upon their evidence it was decreed for the plaintiff.

Cross-examining a witness by one side in any matter tending to the merits, makes him a good witness for the other side, though otherwise liable to an exception.

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BARLOW *versus* GRANT.

27 Octobris. In Court. Lord Keeper.

UPON a Bill for 100*l.* legacy given to a child, the defendant insisted upon an allowance of 16*l.* a-year for keeping the legatee at school.

Money expended for maintenance and education, shall be allowed out of a small legacy given to an infant, though it breaks into the principal. Otherwise, where the legacy is considerable.

It was objected, that only the bare interest of the money ought to have been expended in his education, and not to have sunk the principal, as in this case the defendant had done.

But the *Lord Keeper* thought it fit and reasonable to be allowed; and said, the money laid out in the child's education was most advantageous and beneficial for the infant, and therefore he should make no scruple of breaking into the principal, where so small a sum was devised, that the interest thereof would not suffice to give the legatee a competent maintenance and education: but in case of a legacy of 1,000*l.* or the like, there it might be reasonable to restrain the maintenance to the interest of the money. (1)

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(1) Reg. Lib. 1684. A. fol. 149. These points do not appear by the Register's Book. In this case *Robert Grant* made his will, and thereof appointed his wife and the defendant his eldest son executors. The wife died, and on a bill for an account the defendant claimed to be allowed (amongst other things) certain sums of money that he had disbursed for the maintenance and livelihood of three other of the children, claiming under the will, and the decree as to that is, "That the Master on taking the account is to allow the defendant for "the maintenance and education of the "said children, to the time they were "able to go to service and no further." Vide as to payment of principal of legacy to a child, *Anon.* 2 Vent. 353. *Franklin* v. *Green*, post 2 vol. p. 137. *Dagley* v. *Tolferry*, 1 P. Wms. 285, and note there. *Harvey* v. *Harvey*, 2 P. Wms. 23. *Philips* v. *Paget*, 2 Atk. 80. *Cooper* v. *Thornton*, 3 Bro. Ch. Rep. 96, 186. Executors not to pay legacy given at 21, except for express necessaries. *Davis* v. *Austen*, 1 Ves. jun. 247. 3 Bro. Ch. Rep. 178, S. C. Trustee shall not of his own authority break in upon infant's fortune, *Walker* v. *Wetherell*, 6 Ves. 473. From these cases the rule seems to be that the court will not permit executors and trustees to break in upon the capital of infants' legacies without the sanction of the court, and that the court itself though it will break in upon the capital for the purpose of advancement, will rarely do so for the mere purpose

BARLOW v. GRANT.

In this case there being 30*l.* also given to the infant to bind him an apprentice, the infant died before he attained a competent age to be placed out an apprentice, and the question was, whether this 30*l.* should go to the executor of the infant? (2)

Legacy given to an infant to put him out apprentice, and he dies before he is of a competent age to be put out.

Lord Keeper. I think this 30*l.* ought to go to the executor or administrator of the infant: and in this case the infant being 17 years old, and having made a will, and named an executor, it was allowed to be a good disposition of the 30*l.*

It shall go to his executor or administrator.

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of maintenance [See also *Beasley* v. *Macgrath*, 2 Sch. & L. 35. *Ex parte Darlington*, 1 Ba. & Bea. 240. *Ex parte Mackey*, 1 Ba. & Bea. 405. *Ex parte Green*, 1 J. & W. 253.] As to the doctrine of the court where bequest to *A.* and his heirs male, vide *Wilson* v. *Vansittart*, Amb. 562, where decreed to *A.* for life, and then to his sons equally: where to *A.* to be divided between himself and his family, or to *A.* for her and her children's use, vide *Cooper* v. *Thornton*, 3 Bro. Ch. Rep. 96. *Robinson* v. *Tickell*, 8 Ves. 142, in both which cases the court decreed the whole to the parent.

(2) Vide *Sydney* v. *Vaughan*, Dom. Proc. July 1721.

HEYCOCK *versus* HEYCOCK.

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Case 248.

Eodem die.

In Court.

Eq. Ca. Ab. 72, pl. 5. 119, pl. 9. 2 Ch. Ca. 124. S. C.

IN this case the *Lord Keeper* declared, he took it to be the law of this court; that where there is a devise of a sum certain to be raised out of profits of lands; if the profits will not amount to raise the sum in a convenient time, the court will decree a sale. (1)

Money devised to be raised out of profits, and the profits will not raise it in a convenient time, the court will decree a sale.

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(1) Vide *Anon.* ante p. 104. *Backhouse* v. *Middleton*, 1 Ch. Ca. 173, 208. *Offley* v. *Offley*, Pre. Ch. 27. *Talbot* v. *Duke of Shrewsbury*, ibid. 394. Powell's Law of Mort. p. 82.

PARKER *versus* ASH.

Case 249.

28 *Octobris.*

In Court.

Lord Keeper.

THE bill was for payment of a legacy, given to the plaintiff by the will of *A. B.* in which will many legacies, and (amongst others) the plaintiff's legacy, were erased, and such erasures were supposed to have been done by the testator in his lifetime: but when the will came to be proved, and this matter contested in the spiritual court, the executrix submitted that the will should be proved, as if no such

How the spiritual court proceeds where there are erasures in a will, and the executrix submits to have the will proved, as though no such erasures had been therein.

PARKER v. ASH.

erasures had been made; and an instrument purporting her consent to this matter, was annexed to the will. (1)

Lord Keeper. I take the executrix to be concluded by this consent, which prevented the examination of the matter when it was fresh; and it may be that she knew that the erasures could have been proved to have been made after the death of the testator: but said, the usual course in such cases is to have a sentence against the erasure, and then a probate granted with the words rased out inserted therein. (2)

Then the length of time since the death of the testator, and the staleness of the demand were insisted upon. (3)

A legacy not within the statute of limitations.

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But to this it was answered, that a legacy is not within the statute of *Limitations;* (4) and length of time is only a presumption of payment; (5) but in this case the defendant does not pretend a satisfaction, but only contests the duty. And there is this difference between debts and legacies, as to their antiquity. Legacies always appear upon the face of the will, and so an executor knows what he ought to pay, without being asked or told: but for debts and other dormant demands, against which he cannot provide without notice, there the statute had reason to limit the time.

The *Lord Keeper* decreed the legacy against the defendant, who was executor of the executrix: and the first executrix having delivered over great part of the assets to the defendant in her lifetime, an account had been afterwards stated

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(1) This instrument was a declaration by the executrix registered in the ecclesiastical court before she was admitted to prove the will that she accepted of the said will and executorship chargeable with the legacies demanded by the plaintiff, and that she would perform and discharge the said will as by law she ought to have done, in case the said words and legacies had not been there rased out, and it was declared by the decree that this declaration affixed to the probate of the will ought to be accepted and taken as part of the will of the testator, and that the legacies claimed by the plaintiff ought to be paid accordingly, Reg. Lib. 1683. B. fol. 479.

(2) Vide *Plume* v. *Beale*, 1 P.Wms. 388, and cases cited in not. there, *Masters* v. *Masters*, ibid. 425.

(3) The demand is stated to be above 40 years old. And this bill was filed against the executor of the executrix of the original testator, under whose will the plaintiff claimed and who had in her lifetime released the defendant, R. L. Vide *Fotherby* v. *Hartbridge*, post 2 vol. 21.

(4) *Anon.* 2 Freem. 22, pl. 20, and such is the clearly received doctrine of the court, and upon which the cases on presumption of payment of legacies have gone.

(5) It is a presumption of fact in legal proceedings that claims the most solemnly established upon the face of them will be presumed to be satisfied after a length of time, *Jones* v. *Turberville*, 2 Ves. jun. 13, payment of legacy presumed after 40 years, and demand made but not proceeded in, ibid. *Lewis* v. *Lord Teynham*, cited there.

betwixt them, and a release given: however it was directed, that an account should be taken of the whole assets, and that what the defendant had received, he was to answer out of his own estate, and that what was wasted by the first executrix, the defendant was to answer as far as he had received assets. (1)

PARKER v. ASH.

(1) With interest from the exhibiting the bill, Reg. Lib. 1684. B. fol. 28.

MASSENBURGH *versus* ASH.

Case 250.

Eodem die. In Court. Lord Keeper.

Ante Case 230. *Post Case* 298. 2 Ch. Rep. 275.

IT having been ordered at the hearing of this cause, that a case should be drawn up, as it stood upon the deed, for the *Judges* of the *Common Pleas* to give their opinion upon; it was now moved, that the *Lord Keeper* would rehear the cause, and be attended with *Judges*, or that it might be presented to the *Judges* for their opinions, as a case in equity, as well as a point in law.

The *Lord Keeper* declared his opinion was, that he could go no farther in equity, than the law went in case of an executory devise; but however directed the case to be drawn up at large for the *Judges'* opinions, as well in point of equity as of law; and in case they were of an opinion, that equity ought to go farther than the law, he would consider further of it.

DUX BUCKS *versus* SIR ROBERT GAYER.

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Case 251.

30 *Octobris.*

In Court. Lord Keeper.

Mortgagee recovers judgment in ejectment, but in combination with the tenant in possession refuses to take out execution.

SIR *Robert Gayer*, who was a mortgagee under the *Duke*, had brought an ejectment, and recovered judgment against the *Duke* of his *Berkshire* estate, of which one *Goodchild* who had a lease for three years was in possession, but paid no rent, and was in truth insolvent: and Sir *Robert Gayer* in combination with this *Goodchild* (who was accountable to the Duke for 18,000*l.*) refused to take out execution; and the *Duke* could not eject *Goodchild* by reason of *Gayer's* judgment. It was therefore moved, that Sir *Robert Gayer* He shall be compelled so to do, or answer for the profits, as in case of wilful default. *Vid. post Case* 262 & 265.

DUX BUCKS v. SIR R. GAYER.

might be compelled to take out execution, and receive the profits in discharge of his debt.

But it was said by the counsel for the defendant, that no order was ever yet made to compel a mortgagee to take out execution, whether he would or not; and to order the defendant to take out execution, might involve him in a suit with *Goodchild:* and it was to make him, *nolens volens,* the *Duke's* bailiff: and a mortgagee, who desires to act discreetly, would not enter before he had foreclosed the equity of redemption.

The *Duke's* counsel said, they would not compel Sir *Robert Gayer* to be the *Duke's* bailiff, but in case he did not think fit to receive the profits, they desired the rent might be brought into court; which the court held reasonable: and ordered that unless Sir *Robert Gayer* take out execution before the end of the term he should be answerable for the profits, as in case of wilful default. (1)

(1) This order is recited in another order made in the cause, 13th Dec. Reg. Lib. 1684. A. fol. 728., but does not appear elsewhere. And it appears that *Goodchild* had filed a bill against the Duke stating articles of agreement under the hand and seal of the Duke, by which *Goodchild* was to have *Chippenham Farm,* (for which *Gayer* had obtained judgment in ejectment) for three years without rent, and to receive yearly of the Duke the sum of 1,950*l.* in consideration whereof *Goodchild* was to make provision for the Duke and his family at *Cliefden,* which he continued to do, and that *Goodchild* by his answer had sworn that on that account there was due to him from the Duke 3,000*l.* and it appears that to this bill the Duke had refused to put in an answer, and had stood out to a sequestration, and by this order the Duke was ordered to answer by the end of the term, or that the bill should be taken *pro confesso* against him, and that the above-mentioned order should stand so far only as to intimate what opinion the court had in that matter, and did therefore leave the said Sir *Robert Gayer,* to act therein at his peril, and as he should be advised, Reg. Lib. ibid. Vide *Chapman* v. *Tanner,* post 267, and cases cited in not. there. And the doctrine and cases on this head of equity stated and collected in Powell's Law of Mortgages, 993, et seq.

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Case 252.

31 *Octobris. In Court. Lord Keeper,* and *Justice Levinz.*

CARTER *versus* CARTER.

THE Case was, *Ralph Carter,* and *John Dawson* executor of *Richard Carter* of the one part, and *Anne Carter* the widow of the said *Richard Carter* of the other part, having submitted themselves to an award, and entered into a recog-

Eq. Ca. Ab. 49. (B). pl. 2. If *A.* and *B.* on one part and *C.* on the other submit to arbitration, the arbitrators may make an award, not only of matters in difference between *A.* and *B.* jointly, or *A.* and *B.* separately, and *C.,* but also of matters between *A.* and *B.*

nizance for performance of it; an award was made, wherein reciting, that the said *Richard Carter* had acknowledged a judgment of 100*l.* to the said *Ralph Carter;* and that the said *Anne Carter,* as being *terre tenant,* was by reason of that judgment disturbed in her jointure; it was (amongst other things) awarded that the said *Ralph Carter* should acknowledge satisfaction upon this judgment.

In a *scire fac.* upon this recognizance, the breach assigned was, that satisfaction was not acknowledged upon the judgment: and the exception taken by Mr. *Holt* was, that the award was larger than the submission: for when *A.* and *B.* of the one part, and *C.* of the other, submit to an award; that is a submission of the differences that *C.* had with *A.* and *B.* jointly, or with either of them severally; but this does not submit any differences that might be between *A.* and *B.* Now in this case *Ralph Carter,* the conusee of the judgment, had two remedies; one against *Anne Carter* as *terre tenant,* to bind the lands; and another remedy against the said *John Dawson* as executor of the said *Richard Carter,* to follow the personal estate; and therefore the award ought not to have been, that satisfaction should be acknowledged on the judgment, which destroyed both remedies, but only that the land should be freed and discharged from this judgment.

But upon hearing of Mr. *Pollexfen* on the other side, the *Lord Keeper* and Mr. *Justice Levinz* were both of opinion, that the award was well made, and the breach well assigned; for that all parties concerned in the judgment were before the arbitrators; and *Ralph Carter,* who made the submission, had the whole power of the judgment in him; and therefore ordered judgment to be entered upon the *scire fac.* unless better cause was shewn to the contrary, &c. (1)

(1) There are several entries in the Register's Book in this cause, but none appear of this date or containing the point above-mentioned, vide *Liltrat* v. *Field,* 1 Keb. 885. *Joyce* v. *Haines,* Hard. 399. *Arnold* v. *Pole,* Rol. Ab. D. 5. As to agreement between submission and award, vide Kyd's Law of Awards, 140, et seq.

Case 253.

DUNCH *versus* KENT and Al'.

Eodem die.

In Court. Lord Keeper.

Eq. Ca. Ab. 147, pl. 12. post 319, S. C.

Deed of trust for payment of such creditors as come in within a year. A creditor will not be excluded, though he doth not come in, until after the year. But a bill may be exhibited after the year to compel the creditors, who stand out, to come in or renounce the benefit of the trust.

THE *King* being indebted to *Colvile* a banker in 85,832*l.* 17*s.* 8*d.* and *Lindsey* a bankrupt having married *Colvile's* widow, and executrix, the *King* by his letters patent, (1) in consideration of the said debt, grants to *Lindsey* an annual sum issuable out of the hereditary excise, (2) upon special trust in the patent declared, that all such of *Colvile's* creditors, as would come in within a twelvemonth, and accept a share of this annual sum proportionable to their debts, should have the same assigned to them. The year was long since passed; and the plaintiff being a creditor of *Colvile's* brings his bill to have the benefit of this trust, and complains that *Lindsey* had made several assignments to the defendants, who were none of *Colvile's* creditors, and that *Lindsey* had out of *Colvile's* estate paid off several bonds, and kept the same on foot, and made assignments of them to the defendants in satisfaction of his own proper debts, under colour whereof they had come in under this trust, and had the benefit of these letters patent.

Where a deed of trust is for payment of debts in general, a purchaser is not affected with any misapplication of the money.

In this case for the plaintiff it was insisted, that although *Colvile's* creditors came not within the year, that yet this was a continuing trust for them. And Mr. *Solicitor* did admit, that a trustee for payment of debts in general, may sell upon good consideration, and the purchaser, though he had notice of the trust, shall not be affected with any misapplication of the money; for the land being sold for a good consideration, *that* is discharged; (3) and it is the money that is to be applied for payment of the debts; unless the

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(1) Dated 3d May, 1677.

(2) 5,149*l.* 17*s.* 4*d.* payable to *Lindsey*, his heirs and assigns for ever.

(3) So land settled in trust to pay debts is discharged as soon as the money is raised, though misapplied by the trustees. *Anon.* in Dom. Proc. Salk. 154. *Sed quære*, whether the rule will hold where the purchase is not from original trustees but from others to whom they conveyed, *Lord Braybroke* v. *Inskip*, 8 Ves. 417. Where the first trust is for payment of debts, the purchaser is not bound to look to the application of the purchase-money, *Williamson* v. *Curtis*, 3 Bro. Ch. Rep. 96. And for the cases under the head of purchaser being or not being compelled to see to the application of purchase-money, vide *Crewe* v. *Dicken*, 4 Ves. 97. *Jenkins* v. *Hiles*, 6 Ves. 654. Powell's Law of Mortgages; as to personal estate, 137, et seq.; as to real, 281, et seq. Fonbl. Tr. Eq. Book 2. ch. 6. § 2. in not. [See also *Macleod* v. *Drummond*, 17 Ves. 152. *Watkins* v. *Cheek*, 2 S. & S. 199.]

debts be particularly mentioned in a schedule, or in the deed of trust; and in such case, the purchaser must at his peril see the money rightly employed, and the debts discharged: (1) and it was admitted, that if *Lindsey* had administered *Colvile's* estate, and was in disburse more than the assets which he had received amounted to, that for so much *Lindsey* was a creditor to *Colvile*, and should have the benefit of this trust.

DUNCH v. KENT & AL'.

Otherwise, where it is for payment of debts particularly specified.

But in this cause there being many defendants, and their cases different and distinct, the *Lord Keeper* would not enter into the debate of any of them, but referred it to a Master, to state all the particular cases to the court, and directed the Master to certify when the assignments were made, and whether for *Lindsey's* proper debts, and whether *Lindsey* was a creditor to *Colvile* at the time of the assignments made; and in that respect he was to see, if *Lindsey* compounded any of *Colvile's* debts; for he being executor in right of his wife, he could not have the benefit of those compositions.

(1) Vide *Spalding* v. *Shalmer*, post 303, where said if more is sold than sufficient to pay the debts that shall not turn to the prejudice of the purchaser, for he is not obliged to enter into the account. *Juxon* v. *Brian*, Pre. Ch. 143. *Cotterell* v. *Hampson*, post 2 vol. 5. *Gugleman* v. *Dupont*, Hil. 12 Geo. II. in Chan. 1738.

ANONIMOUS.

Case 254.

Eq. Ca. Ab. 73, pl. 13.

In a bill against executors, who are only executors in trust, it is not necessary to make the *cestui que trusts* or residuary legatees parties.

IN a bill to be relieved touching a lease for years or other personal duty against executors; though the executors be but exeecutors in trust, yet it is not necessary to make the *cestui que trusts* or residuary legatees parties. (1)

(1) Contra as to *cestui que* trusts, *Kirk* v. *Clark* and *Al'*, Pre. Ch. 275. And in all other cases of trusts *cestui que trust* must be a party, but the trustee need not, especially if *cestui que trust* undertake for him, ibid. Pre. Ch. 275. This, however, it is apprehended must depend upon the nature and extent of the trustee's interest. [See Mitford, Tr. 145, 135, 139.] But in a bill by creditor or legatee against executor it is not necessary to make residuary legatee a party, *Lawson* v. *Barker*, 1 Bro. Ch. Rep. 303. [*Kirk* v. *Clark*, cited above, was on a *deed*, and consequently does not apply to the doctrine laid down in the principal case as to trusts arising under a will.]

Case 255.

PALMER *versus* TREVOR.

4 Novembris. In Court. Lord Keeper.

Eq. Ca. Ab. 58, pl. 6. 301, E. pl. 3, S. C.

Legacy bequeathed to a feme covert. Payment to her alone not good. (1)

A. B. devised 100*l.* to the plaintiff's wife, to be paid within six months after the testator's death; and a bill being brought for this legacy, the defence, which the defendant the executor made, was, that he had paid the legacy* to the plaintiff's wife, and had her receipt for it: and the defendant's counsel insisted, that this was a good payment; for that without doubt a man might so devise a legacy to a feme covert for her separate maintenance, as that the husband should not intermeddle with it, and that the wife's receipt should be a sufficient discharge for it. And they further insisted that such was the intent of the testator in this case, and that the will ought to be so construed in equity; for at the time of making this will, the plaintiff and his wife were parted, which was then well known to the testator, and that the wife was much straightened for want of maintenance; and it was said that the *civil* law, whereby legatory matters were properly determinable, was, that such a legacy ought to be paid to the wife: but the defendant's counsel not being prepared to maintain that point, the *Lord Keeper* held it no good payment; and decreed the legacy to be paid to the plaintiff with interest; it being to be paid by the will at a certain time, *viz.* within six months after the testator's death.

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Where a legacy is to be paid at a certain day, it shall carry interest from that time, if not paid. (2)

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(1) For a wife cannot, during coverture, acquire property distinct from her husband, *Lightbourn* v. *Holyday*, 2 Eq. Ca. Ab. 1. pl. 5. *Coomes* v. *Elling*. 3 Atk. 679. As to property given by husbands and strangers to trustees for the wife, vide *Bletsow* v. *Sawyer*, ante p. 245, and cases there cited. *Taylor* v. *Jones*, 2 Atk. 600. *Coomes* v. *Elking*, ub. sup. *Garforth* v. *Bradley*, 2 Vez. 676. As to what shall be considered as reducing into possession in respect of a legacy, *Blount* v. *Bestland*, 5 Ves. 515. *Sawer* v. *Shute*, 1 Anstr. 63. *Campbell* v. *French*, 3 Ves. 323. [*Wall* v. *Tomlinson*, 16 Ves. 413.] And money due to a feme covert even under a decree will not be paid to trustees in the settlement, if the settlement be not mentioned in the pleadings, without a reference to the deputy remembrancer, (or if in chancery it is presumed the Master) to see whether there is a settlement or not, *Hardwick* v. *Mynd*, 1 Anstr. 274. But such a legacy is in the nature of a chose in action, and if not received or otherwise reduced into possession by the husband in his life-time it shall survive to the wife, for a release by the husband shall not be presumed, *Brotherow* v. *Hood*, 2 Com. Rep. 725. And it should seem as a general principle that where the property of the wife rests in contract that does not give a certain right to the husband, it shall survive to the wife.

(2) But a demand must be made to carry interest, *Jolliffe* v. *Crew*, Pasch. 1701, Pre. Ch. 161. Contra except

where a legacy be devised generally, *Smell* v. *Dee*, 2 Salk. 415, cited Eq. Ca. Ab. 286, pl. 1, 2. And except in cases of infancy and lunacy, ibid. But where legacy brought into court and legatee hath notice of it he shall lose the interest from that time, unless he pray to have the money, or have it laid out, *Maxwell* v. *Wettenhall*, 2 P.Wms. 26. And at law it seems *uncore prist* in an action against executor on bond to fulfil the will was held a good plea, *Fringe* v. *Lewis*, 1 Leon. 17. *Slaning's* Case, Poph. 104. Et vide *Churchill* v. *Lady Speake*, ante 250. and cases cited in note there.

FOSTER *versus* MARCHANT, & *è contrà*.

Case 256.

Eodem die. In Court. Lord Keeper.

THE bill was by a second committee of a lunatic against the first committee & *Al'* to call him to an account for the profits of the lunatic's estate.

Eq. Ca. Ab. 277, pl. 4. 326, pl. 13, S. C.

Lord Keeper. The committee of a lunatic has an estate but during pleasure, and therefore cannot make leases, nor any ways encumber the lunatic's estate, without special order of this court, where the profits are not sufficient to maintain the lunatic. (1)

Committee of a lunatic cannot make leases, nor encumber the lunatic's estate, without leave of the court.

In this case, the lunatic, before he became such, having made a mortgage of good part of his estate for 50*l.* the committee had transferred this mortgage, and taken up 3 or 400*l.* more upon it.

Mortgage made by a lunatic when *sane*, for 50*l.* and more money taken upon it by the committee, ordered to stand a security only for the first 50*l.*

The *Lord Keeper* declared, the mortgage should stand a security for 50*l.* only. [263]

And as to improvements and buildings made by the first committee on the lunatic's estate, for which he craved an

Committee not to be allowed for buildings and improvements on the lunatic's estate.

(1) *Drury* v. *Fitch*, Hutton Rep. 16. *Blewitt's* Case, Ley. 47. *Beverley's* Case, 4 Rep. 127. And the grant of the custody of lunatic's estate, is a mere authority without an interest, and does not survive. *Ex parte Lyne*, Forr. 143. But he has the same power in cutting timber for repairs as the absolute owner. *Ex parte Ludlow*, 2 Atk. 407. But the property of a lunatic cannot be varied or changed so as to alter the succession, *Sergeson* v. *Sealey*, 2 Atk. 413. *Ex parte Marchioness of Annandale*, Amb. 81. *Ex parte Grimstone*, ibid. 707. [See *Oxenden* v. *Compton*, 4 Bro. C. C. 234. 2 Ves. jun. 69.] Et vide as to the power of committee of lunatic to make conveyances, stat. 4 Geo. II. cap. 10. and leases, stat. 11th Geo. III. cap. 20. [and 43 G. III. c. 75. and mortgages, ibid. and to surrender leases, 29 G. II. c. 31.] Note, it seems that under circumstances the committee may make an agreement in respect of the lunatic's estate for the benefit of the lunatic, where the heir is not affected, *Ex parte Tabbert*, 6 Ves. 428.

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allowance; the *Lord Keeper* declared the heir upon the lunatic's death must be let into the estate, without making any allowance for such improvements. (1)

Master to see what was fit to be allowed for maintenance of lunatic's son.

And as to an allowance demanded for the lunatic's son's maintenance, the *Lord Keeper* referred it to a Master to examine and report, what maintenance was reasonable to be allowed. (2)

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(1) [See *Ex parte Marton*, *Ex parte Hilbert*, 11 Ves. 397.]

(2) But in this case the decree is, that the plaintiff in the original bill, the lessee of the first committee of the lunatic, should enjoy the several leases of the lunatic's estate made to him by the said committee, and the lunatic's son, in case the same were *bonâ fide* made for a valuable consideration, and no fraud used by the plaintiff or his agents, in obtaining thereof, whereby to burden the estate, upon which the Master to whom it was referred to examine the same was to report: and the Master was to look into the value of the fine plaintiff paid for the same, and what rent is reserved thereon, and if it appeared the same was of sufficient value, the leases to stand, and plaintiff to hold the same against defendants, and all claiming by them during the continuance of the respective terms thereby granted, freed and discharged of all incumbrances done by the said lunatic or his son, or said other defendants, and plaintiff to execute counterparts thereof, and to account for rent thereof. And the Master was also directed to examine what moneys from time to time since the defendant *Marchant*, the lunatic, was found a lunatic, the plaintiff or any for him, or by his order, had paid; the court declaring that such sum or sums of money as had since the lunacy been really and *bonâ fide* paid by the plaintiff for the debts of the said lunatic, contracted before the lunacy, or for the maintenance of him or his son, or for his or their use or benefit, or for the defence or recovering of his estate, such moneys as shall so really appear to have been disbursed and paid shall be allowed and paid to the said plaintiff, in case it shall appear to the said Master that the son was not sufficiently maintained and provided for out of some other part of the estate, or by some other person or persons which the Master was also to examine, and make such allowance for the son as he should reasonably think fit, which allowance so to be made was to be paid and allowed to the said plaintiff, and the said Master was to make all just allowances on both sides, and the said mortgage was to stand as a security for what should appear due to the said plaintiff, on the account to be taken as aforesaid: and as touching the account so mentioned to be made up between the said plaintiff and *Ferrars*, the first committee, the Master was to look into and examine if the same was made up without fraud, or contrivance on purpose to charge the lunatic's estate, and before the custody was taken from the said *Ferrars*, and if it appeared that the said Master did find and certify that the same were fairly and *bonâ fide* made and stated without any fraud or collusion in the plaintiff, in such case, such accounts were to stand, and not to be ravelled into unless defendant could disprove the same, and plaintiff to be allowed and paid what on such account shall appear due. Note, plaintiff had taken an assignment of the said mortgages, and paid great sums in defending lunatic's title, and advanced sums of money for care and maintenance of lunatic's son, and an account had been stated between *Ferrars* and plaintiff. It also appears that the premises leased to plaintiff by lunatic before lunacy falling old and ruinous, plaintiff would not repair without a further lease of 11 years. The committee and son of the lunatic joined in a lease for such fur-

ther term to plaintiff, and granted him a lease of other messuages, &c. for 21 years at a rent, and plaintiff agreed to lay out 700*l.* in repairs, and plaintiff *Foster* was to receive rents, to keep down principal and interest of his mortgage, and to account from time to time with *Ferrars*, which he did up to June, 1681. Reg. Lib. 1684. A. fol. 796.

DEGUILDER *versus* DEPEISTER.

Case 257.

Eodem die. In Court. Lord Keeper.

Eq. Ca. Ab. 372, pl. 6. S. C.

THE case was upon a *bottomry* bond, whereby the plaintiff was bound in consideration of 400*l.* as well to perform the voyage within six months, as at the six months' end to pay the 400*l.* and 40*l.* premium, in case the vessel arrived safe, and was not lost in the voyage.

A. intending to go a voyage, enters into a *bottomry* bond, but the ship not going the voyage, but lying all along safe in the port of *London*, the court decreed the defendant should lose the premium, and accept of his principal with usual interest.

It fell out, that the plaintiff never went the voyage, whereby his bond became forfeited: and he now preferred his bill to be relieved; and upon a former hearing, in regard the ship lay all along in the port of *London*, and so the defendant run no hazard of losing the principal; the *Lord Keeper* thought fit to decree, that the defendant should lose the premium of 40*l.* and be contented with his principal and ordinary interest: and now upon a re-hearing he confirmed his former decree. (1)

(1) Reg. Lib. 1684. A. fol. 721. The bond was by one *Naphthali Ball*, to the plaintiff, the ship appears to have been sold, and the interest to be paid was from the date of the bond to the sale of the ship. Plaintiff then petitioned for another re-hearing, whereon the decree was confirmed as above, and plaintiff to pay 40*s.* costs for the day. Equity will not assist the obligee of a bottomry bond, where it carries an unreasonable interest, *Dandy* v. *Turner*, Eq. Ca. Ab. 372, pl. 7. But the reasonableness or unreasonableness of the interest depends upon the risk, *Chesterfield* v. *Janssen*, 1 Atk. 341.

Case 258.

ANONIMOUS.

A *Jew* ordered to be sworn to his answer upon the *Pentateuch.*

A *Jew* being to put in an answer, upon a motion it was ordered, that he should be sworn upon the *Pentateuch*, and that the plaintiff's clerk should be present to see him sworn. (1)

(1) Vide *Omychund* v. *Barker*, 1 Atk. 19.

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Case 259.

FITTON *versus* COM' MACCLESFIELD.

Eq. Ca. Ab. 82, pl. 11. S. C.. Plaintiff allowed to bring a bill of review, without paying the costs decreed in the original cause, upon making oath he was not worth 40*l.* besides the matter in question.

Upon a motion that a bill of review might be admitted, without payment of the costs of the former suit, amounting to 150*l.* for which the now plaintiff as was pretended had been in execution almost 20 years, and was not able to pay them. (1)

Per cur'. Upon his making oath, that he is not worth 40*l.* besides the matter in question, and besides a suit depending between the same parties to foreclose a mortgage, the debt being pretended to be over-paid, he shall be admitted to bring his bill of review without payment of these costs. (2)

(1) The words are, "A considerable "time, and plaintiff is rendered inca "pable of paying such costs by rea- "son the defendant had had the *pos- "session of the plaintiff's estate* for "above 20 years, then last past." R. L.

(2) Unless cause. Reg. Lib. 1684. A. fol. 15. Nothing appears as to the oath. Vide *Williams* v. *Mellish*, ante 117. and cases there cited. Note this order for dispensing with costs upon bringing a bill of review, ought to be set out in the bill, sic dict. arg. post 292, S. C.

WILLIAM MERREITT *versus* JOHN EASTWICKE and ANN his Wife, Administratrix of HUGH PEARCE.

Case 260.

7 Novembris. In Court.

A. having a bill remitted to him beyond sea for a particular purpose, receives part of the money and takes a note for the remainder, payable to himself or bearer, and falling ill gives the note to *B.* with orders to receive the money, and apply it to the use it was designed, and then dies. *B.* receives the money and applies it accordingly. The administratrix of *A.* brings trover and recovers. *B.* brings a bill, and is relieved.

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THIS day the *Lord Keeper* being sent for to the trial of the money in the *pix*, (1) Mr. *Baron Atkins* sat and went on with the causes. And this cause then coming on to be heard, the case was, that the *King* of *Denmark* sent over the said *Hugh Pearce*, his hunstman, into *England*, and remitted to him a bill of exchange for 843*l.* 13*s.* 6*d.* drawn upon one *Jacobson* a merchant in *London*, to buy horses and dogs. He receives all the money except 200*l.* and lays it out accordingly, and delivers up the bill of exchange, and for the other *two hundred pounds* takes a note from *Jacobson*, payable to himself or bearer on demand, and then falls ill, and shortly afterwards died; but in his sickness delivers to the plaintiff, in whose house he lodged, this note for 200*l.* and orders him to lay out the money in horses and dogs for the *King* of * *Denmark's* use; which he accordingly does, and afterwards goes to *Denmark*, and carries over the horses and dogs which had been bought, and accounts with the *King* for the money, and receives a gratuity for his trouble.

After the death of *Hugh Pearce*, the defendant *Anne* his wife takes out administration, and she and her now husband bring an action of *trover* against the plaintiff for this *two hundred pounds*, and recover a verdict.

The bill was to be relieved. (2)

A Judge sitting in the absence of the *Lord Keeper*, being about to make a decree is opposed by the Masters then present, whereupon the cause is continued in the paper.

Upon the hearing of the cause, Mr. *Baron Atkins* was of opinion the plaintiff came too late after a recovery at law, and would have dismissed the bill: but Sir *Samuel Clarke*, Sir *Miles Cooke*, and Sir *William Beversham*, the *Masters* in *Chancery* stood up and opposed it, being of opinion, that there ought to be relief and a decree for the trust; and thereupon the court being divided, no order was made. (3)

And the cause standing in the paper the next day, came on to be heard before the *Lord Keeper*, who declared, that he was satisfied that the 200*l.* received by the plaintiff was part

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(1) Vide the life of *Noy* prefixed to his Complete Lawyer.

(2) As to relief on bill filed after verdict, vide *Barbone* v. *Brent*, ante p. 176, and cases cited there.

(3) Vide as to this point *Smith* v. *Turner*, post 273. *Shapland* v. *Smith*, 1 Bro. Ch. Rep. 75.

MERREITT v. EASTWICKE.

of the *eight hundred forty-three pounds, thirteen shillings,* and *sixpence* remitted by the *King* of *Denmark;* and although *Pearce* had altered the property by taking a bill for it payable to himself or bearer, yet *Pearce* was to apply it for the *King* of *Denmark's* use; (1) and the plaintiff having made such provision as *Pearce* should have done, ought not to be charged therewith as so much of the estate of *Pearce,* he having accounted for the same: and it was ordered that all proceedings at law should be stayed till further order: and there being an account decreed touching some other moneys, which plaintiff had received, the judgment was ordered to stand a security for what should be found due from the plaintiff on the account: but if nothing should appear to be due, satisfaction was to be acknowledged on the judgment.

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Note,—Upon searching the record of this case it appears, that this cause was heard before the *Lord Keeper* on the 8th of *November,* and such decree made as above; but it does not appear by the record that this cause had come on before Mr. *Baron Atkins* the day before. (2)

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(1) But money cannot be followed when invested in purchase of lands, *Kender* v. *Milward,* post 2 vol. 440. *Hooper* v. *Eyles* and *Al'*, ibid. 480. Sed vide *Ryall* v. *Ryall,* 1 Atk. 58, ub. dict. that money that has been laid out in land has been followed in some cases.

(2) Reg. Lib. 1684. B. fol. 153. and see the advertisement prefixed to the 2nd vol. of these Reports, whereby it appears from the Register's minute-book that this cause did come on before Mr. Baron *Atkins* on the 7th of November, and was then ordered to stand for the *Lord Keeper's* judgment.

Case 261.

10 *Novembris. In Court. Lord Keeper.*

Eq. Ca. Ab. 79, pl. 1.

Bill of peace for preventing multiplicity of suits proper.

EWELME HOSPITAL *versus* ANDOVER.

THERE having been time out of mind a fair held at *Weyhill* near *Andover,* which was within the hundred and manor, whereof the corporation of *Andover* were lords; but the pickage and stallage and other profits of this fair being enjoyed by particular tenants, who claimed several acres of the land on *Weyhill* (on which the fair was held) as belonging to their respective estates within the manor; and other part of the soil and profits being claimed by the Hospital of *Ewelme,* and other part by the parson of *Wey;* so that the

corporation had but little or none of the profits of the fair; the corporation, upon surrendering of their old charter, got a clause inserted in the new one, that they might hold the fair in what place they pleased, (which Mr. *Attorney* said, was only an explanation of what the law implied upon the old charter, the fair being granted to them) and now for their own profit they would remove it to another place, the soil whereof belonged to the corporation; and hereupon several actions being brought on both sides, the bill was brought against the town of *Andover* by the tenants of the hospital and parson, to quiet them in their possession.

EWELME HOSPITAL v. ANDOVER.

It was objected by the defendants, that the bill was not proper, the right not having been settled by law: for though the plaintiffs had recovered in two several actions, yet these verdicts were both set aside, as having been gained by a practice upon, and undue solicitation of, the jury; and the *Judges* had certified the verdicts to have passed contrary to their direction.

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Lord Keeper. I take such a bill to be very proper in this court, being a bill of peace, and in such case this court ought to interpose and prevent multiplicity of suits: (1) but in this case the bill praying only special relief, *viz.* that they might be quieted in possession, till the right was tried at law, and not having prayed relief in the premises or a perpetual injunction, the *Lord Keeper* thought the bill not proper for a decree; and directed the plaintiffs to amend the bill in that particular. And the town of *Andover* having a bill to change the venue, complaining that they could not have a fair trial in the county where the action was laid, that bill was dismissed. (2)

Bill to change a venue dismissed.

(1) Vide *Harrison*, Chan. Prac. vol. 1. p. 104. and cases there cited, *How* v. *Tenants* of *Bromsgrove*, ante p. 22. *Fitton* v. *Com. Macclesfield*, post 293.

(2) Contra *Earl of Kildare* v. *Eustace*, post 439. Et vide *Barbone* v. *Brent*, ante 176, and cases in not. there.

Case 262.

Eodem die.
In Court.
Lord Keeper.

CHAPMAN *versus* TANNER.

Eq. Ca. Ab. 56, pl 1. 329, pl. 7. S. C.

A BANKRUPT, before he became such, having made a mortgage of his estate, the assignees of the statute bring an

Mortgagor becomes a bankrupt, and the mortgagee refuses to enter, and permits the bankrupt to continue in possession, and to fence against an ejectment brought by the assignees, with this mortgage.

CHAPMAN v. TANNER.

ejectment for recovery of the lands comprised in the mortgage. The mortgagee refuses to enter, but suffers the bankrupt to take the profits, and to fence against the assignees with this mortgage.

Mortgagee shall be charged with the profits from the time of the ejectment delivered.

Lord Keeper. The mortgagee shall be charged with the profits from the time of the ejectment delivered. (1)

Ante Case 251. *Post Case* 265.

A sells land to *B.* who afterwards becomes a bankrupt, part of the purchase money not being paid.

Another point in this case was, that the bankrupt having bought land, and all the purchase-money not being paid, the assignees would have had the vendor come in as a creditor under the statute, for the remainder of his purchase-money.

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A. shall not be bound to come in as a creditor under the statute, but the land shall stand charged with the money unpaid, though no agreement for that purpose.

Per Cur'. In this case there is a natural equity, that the land should stand charged with so much of the purchase-money as was not paid; (2) and that, without any special agreement for that purpose. (3)

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(1) This does not immediately appear in the decree. The bankrupt's son after his death had got into possession of the mortgaged lands, and a general account (as against him and others, who had got into possession of other lands) of mesne profits during their possession was decreed. R. L.

(2) The vendor having some of the deeds in his hands, said per *Lord Camden*, *Blackburne* v. *Gregson*, 1 Bro. Ch. Rep. 424. The words of the decree in this part are as follow, "As "to the demand of the said defendant "*Samuel Trotman*, (the vendor) being "100*l.* due upon bond, before he de- "liver up the writings in his custody, "his Lordship declared that a natural "equity did arise for him, he having "the writings in his custody, and not "being paid his purchase-money, and "thereupon doth order and decree that "the said defendant *Samuel Trotman* "be paid the said 100*l.* with interest "and costs at law out of the said bank- "rupt's estate, and that upon payment "thereof he deliver up upon oath to "the Commissioners all deeds, &c." R. L.

(3) The vendor had in a schedule to his answer set forth a list of several writings in his hands belonging to the title of the said estate, and which he by his answer swore were by agreement between him and the bankrupt to remain in his hands until he was paid the sum of 100*l.* remaining due of the purchase-money, and for which he had also a bond from the bankrupt. N. B. The plaintiffs had replied to the answer stating the aforesaid agreement, and the defendant, the vendor, had not made any proof of the agreement. Reg. Lib. 1684. A. fol. 176. So where bankrupt articles to sell, assignees cannot compel purchaser to pay remainder of purchase-money unless title made according to articles, *Orlebar* v. *Fletcher*, 1 P. Wms. 737. Et vide *Coppin* v. *Coppin*, 2 P. Wms. 291., and cases cited in not. there. And it seems now the settled doctrine of the court that equity gives the vendor a lien for the price of the estate sold, without any special agreement, *Nairne* v. *Prowse*, 6 Ves. 759. at the Rolls: but such lien may be lost by vendor accepting a special security, ibid. 760. So said as to securities generally per *Lord Camden*, Chan. *Fawell* v. *Heelis*, 14th June, 1733. Amb. 726. And so held in the case where vendor received a note of hand for part, and mortgage for other part, *Bond* v. *Kent*, post 2 vol. 281. Upon the general principle of marshalling adopted in equity the benefit of the

vendor's lien may be extended to third persons, *Trimmer* v. *Bayne*, 9 Ves. 209, at the Rolls. Et vide Powell's Law of Mortgages, 1031, et seq. [*Mackreth* v. *Symmons*, 15 Ves. 338. *Headley* v. *Readhead*, Coop. 50. And see further as to the vendor's lien, *Elliott* v. *Edwards*, 3 Bos. & P. 181. *Hughes* v. *Kearney*, 1 Sch. & L. 132. *Cowell* v. *Simpson*, 16 Ves. 278. *Grant* v. *Mills*, 2 V. & B. 306. *Ex parte Loaring*, 2 Rose, 79. *Ex parte Peake*, 1 Madd. 346. *Saunders* v. *Leslie*, 2 Ba. & Be. 509. *Ex parte Parkes*, 1 G. & J. 228. *Winter* v. *Anson*, 1 S. & S. 434.]

BARRELL *versus* SABINE.

Case 263.

11 *Novembris.*

In Court. Lord Keeper.

What circumstances may induce the court to make an absolute conveyance redeemable or not.

Upon the hearing this cause, the single question was, mortgage or no mortgage; and it being before the statute of *Frauds* and *Perjuries*, for proof of its being a mortgage, it was urged for the plaintiff, *first*, the over-value, *viz.* that it was a church lease of 180*l. per ann.* over and above the rent reserved and all reprises, and renewed at the time of the pretended purchase, and made up a complete term for 21 years. And Mr. *Serjeant Barrell's* purchase-money was but 950*l.* of which not one penny came to the vendor's hands, but all went for discharging incumbrances, and in repairs and renewing the lease; and that the defendant was offered much about the same time for this lease 1,400*l.* 2*dly*. That *Sabine* was at the charge of the conveyance. 3*dly*. That Serjeant *Barrell* should declare, if *Sabine* would repay his money within a year and half, and give the *Serjeant* 100*l.* for his pains, *Sabine* should have his estate again; and to prove that such a declaration was sufficient to make it a mortgage, they cited the cases of *Cole* and *Martin*, and *Beale* and *Collins*.

On the other side it was answered, the over-value was not so great as was pretended, and that this had all the forms and steps of an absolute purchase, there being first express articles for an absolute purchase, and then a conveyance made in pursuance of those articles, and possession delivered immediately upon execution of the conveyances.

The *Lord Keeper* said, he was fully satisfied, that it was not originally a mortgage, but an absolute purchase: but believed *Sabine* might complain he had sold his estate too cheap; and that thereupon Mr. Serjeant *Barrell* might declare, if he would repay him his money within one year, and give him 100*l.* for his pains, that he should re-purchase his estate, which *Lord Keeper* believed was the true state of [269]

BARRELL v. SABINE.

Where there is a clause or provision in the conveyance for the vendor to re-purchase, the time limited for that purpose ought to be precisely observed.

the case: and cited Sir *Anthony Cage's* case of a clause to re-purchase, which made so much stir in *Westminster Hall:* and said, he thought that where there was a clause or provision to re-purchase, the time limited ought to be precisely observed; and said, that as to the *Serjeant's* agreement, that *Sabine* might re-purchase for 100*l.* more, that seemed reasonable in respect of his trouble, and for that the estate was the more valuable, as having gone through a lawyer's hands, who understood the title, and *that* might be a means to encourage purchasers. And dismissed the bill. (1)

(1) Vide *Newcomb* v. *Bonham*, ante p. 7. *Manlove* v. *Ball*, post 2 vol. 84. *Cotterell* v. *Purchase*, Forr. 61.

Case 264.

13 *Novembris.*

In Court. Lord Keeper.

Eq. Ca. Ab. 284, pl. 2. S. C.

BAILEY *versus* DEVEREUX.

This court will not suffer a man to be sued at law for executing the process of the court, though it issued irregularly.

UPON a motion for an injunction, the case was, that an action of assault, battery, and false imprisonment was brought at law against the plaintiff for arresting the defendant on a commission of rebellion, which issued irregularly.

Per Cur'. The plaintiff must have an injunction; for the irregularity ought to be punished in this court, and can only be examined and determined here, whether regular or not; for at law, supposing the commission of rebellion issued regularly, they will not allow *that* as a justification; and therefore the injunction was granted; and it was referred to a Master to examine whether the commission of rebellion issued regularly or not; and in case he found it irregular, to tax the defendant his costs. (1)

(1) *November* 6. A motion on the part of the defendant was made to dissolve an injunction which had been obtained by the plaintiff. And the order from the Register's Book appears to be, "That the irregularity of the proceed- "ing be referred to be examined by "the Master, who is to certify the "same," and it was further ordered, "That the defendant should be at li- "berty to proceed to trial unless cause "shewn on a given short day, and the "defendant in the mean time is at "liberty to prepare for trial." Reg. Lib. 1684. A. fol. 36. No further entry appears.

COPPRING *versus* COOKE: and COOKE *versus* KNIGHT & Al'.

Case 265.
14 *Novembris.*
In Court.
Lord Keeper.

Mortgagee enters, and thereby prevents subsequent incumbrancers from entering, and yet permits the mortgagor to receive the profits. He shall be charged with all the profits he had or might have received since his entry. *Ante Case* 251 and 262.

BILL to redeem a mortgage. The case was, that the mortgagee had obtained judgment in ejectment, and entered on the mortgaged premises, and thereby prevented other creditors that had subsequent securities from entering, and yet permitted the mortgagor to take the profits; and now the other creditors coming to redeem him, the court ordered the mortgagee should be charged with all the profits he had, or might have received since his entry. (1)

(1) Vide *Chapman* v. *Tanner*, ante p. 267. *Bentham* v. *Haincourt*, Pre. Chan. 30. Powell's Law of Mortgages, 1031, et seq. 1039. And as to costs of mortgagee vide *Detillin* v. *Gale*, 7 Ves. 583, where, in the case of gross misconduct mortgagee deprived of his costs, and in the case of *Shuttleworth* v. *Lowther*, there cited, ordered to pay costs on the ground of a tender and appropriation of the money and refused. [See also ——— v. *Trecothick*, 2 V. & B. 181. *Morony* v. *O'Dea*, 1 Ba. & Be. 121.]

TYTE *versus* TYTE.

Case 266.
'17 *Novembris.*
In Court.
Lord Keeper.

Eq. Ca.Ab.106, pl. 3. S. C.

Black Acre is devised to *J. S.* with a proviso that if he be evicted, he shall have White Acre: *J. S.* is evicted of a moiety of Black Acre. He shall only have a satisfaction *pro tanto* out of White Acre.

A MAN by will devises lands called *Styles*, to his younger son, and thereby declares, that in case his son should be any way hindered or prevented from enjoying the lands called *Styles*, then in lieu thereof he gave him all those his lands called *Darrow Barne*.

The plaintiff by his bill sets forth, that he was the heir of the devisor, but that neither he, nor in truth the devisor, was intitled to more than to one moiety of the lands called *Styles*, and that the defendant *J. N.* a stranger was intitled to the other moiety, and had evicted the devisee: and sets forth that *Darrow Barne* was of much greater value than *Styles*, and that it was not through his default, that the devisee did not enjoy *Styles*; and charged a combination betwixt the devisee and the other defendant *J. N.* and prayed relief as to the over-value of *Darrow Barne*. (1)

(1) The bill was filed by the devisee of *Darrow Barne* and other lands, (who claimed to be entitled to *Styles*, or to a moiety thereof, and who, it ap-

TYTE v. TYTE.

The *Lord Keeper* was clear of opinion, that this being a condition, that lay in compensation, the plaintiff ought to be relieved; and decreed, that the defendant the devisee should have a compensation, (1) for the land evicted, set out in *Darrow Barne*, and that the plaintiff should be relieved as to the over-value. (2) But the defendant *J. N.* that had the other moiety of *Styles*, having all along fomented suits on both sides, and the court threatening to saddle him with costs, he submitted, that the defendant the devisee should have his (*J. N.'s*) moiety of *Styles*, and he to take a compensation out of *Darrow Barne:* and it was decreed accordingly. (3)

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pears by the answer of one of the defendants, the devisee of *Styles*, had entered thereon) for an account, and to be relieved against the proviso in the will, he offering to make satisfaction for the moiety of *Styles*, from which he had evicted the defendant, either in land or money out of *Darrow Barne*, and the other lands included in the proviso. R. L.

(1) Either in land or money.

(2) Vide *Popham* v. *Bampfield*, ante 79, and cases cited in note there.

(3) Reg. Lib. 1684. B. fol. 170.

Case 267.

COTTON *versus* ILES.

19 *Novembris. In Court. Lord Keeper.*

MORTGAGEE in fee enters for a forfeiture, and after seven years enjoyment absolutely sells the land to *J. S.* and his heirs.

Eq. Ca. Ab. 273, pl. 2. 328, pl. 6. Barn. 46. S. C.

A man purchases absolutely of a mortgagee in fee in possession, and dies. As between his heir and executor it shall be considered as real estate and go to the heir.

Per Cur'. The estate shall not be looked on to be a mortgage in the hands of *J. S.* so as to make it part of his personal estate, but it shall be for the benefit of the heir. (1)

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(1) Vide *Wynne* v. *Lyttleton*, ante p. 4. *Pockley* v. *Pockley*, ante p. 36. So in the case of mortgagee in fee, testator having entered, the mortgage may be considered as real estate, according to interest of the testator in respect of the real and personal representative of his devisee, though, as between him and the mortgagor it be still but a mortgage. *Noy* v. *Mordaunt*, post 2 vol. 581.

JOHNSON, Executor of HILL, *versus* NOTT.

Case 268.

Eodem die. In Court. Lord Keeper.

Ante Case 161.

If an heir sells a reversion in the life of his father at an under-value, the court will not in favour of such a purchaser decree a specific performance of a covenant for further assurance.

HILL bought of the defendant *Nott* in the lifetime of Sir *Thomas Nott*, his father, the reversion of a house at *Richmond* at an under-value, by reason of the contingency, that if the defendant *Nott* had died in the lifetime of Sir *Thomas* his father, *Hill* had lost all his purchase-money; and after the death of Sir *Thomas Nott*, who died about ten years after this contract was made, *Nott* brought his bill to be relieved against the bargain, and was relieved by *Lord Nottingham*, but upon a re-hearing before the *Lord Keeper* that decree was reversed.

Now this bill was brought by *Johnson* the executor of *Hill*, setting forth that *Nott* the defendant was only tenant in tail, and had covenanted to make further assurance, and prayed he might be compelled to perform his covenant in *specie* and be decreed to levy a fine.

Upon the hearing the *Lord Keeper* denied the plaintiff any relief, and said upon the first hearing on *Nott's* bill he thought it a hard case, though he did not see sufficient reason to set aside the contract: but as to the plaintiff's bill he said a contract which carries an equity to have it decreed in *specie*, ought to be without all objection; (1) and said the practice of purchasing from heirs was grown too common, and therefore he would not in any sort countenance it; and dismissed the bill, and left the plaintiff to bring his action of covenant at law. (2)

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(1) *Phillips* v. *Duke of Bucks*, ante 229.

(2) *Batty* v. *Lloyd*, ante 141, and cases cited in not. there. Et vide *Waller* v. *Dalt*, 1 Ch. Ca. 276.

PLAMPIN *versus* BETTS.

Case 269.

20 *Novembris. Lord Keeper.*

A decree whereby the defendant was to be concluded by the plaintiff's own oath, reversed.

ON a demurrer to a bill of review. The plaintiff by his original bill suggests, that all receipts touching the dealings in question were lost, and prays an account and discovery from the defendant. The defendant in his answer sets forth his books of account and his receipts and payments;

PLAMPIN v. BETTS.

and swears, he received no other money of the complainant's.

After this the plaintiff produces his receipts, which differ, as to the dates, from the entries in the books of account set out by the defendant in his answer: and after many wrangles in taking the account, an order was made by the *Lord Chancellor Nottingham*, that in case the plaintiff would make oath that he believed the sums in question to be distinct sums, they should be taken as such. (1) And *this*, as also that the plaintiff's oath in some other cases should conclude, was the

[273] error assigned; and for that reason the decree was reversed; the *Lord Keeper* saying, there was no colour to make such an order; but if there had been sufficient evidence without, and the oath had been *ex abundanti* only, it had been otherwise. (2)

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(1) The original bill appears to have been filed by the defendant in the bill of review against the now plaintiff who was administrator *de bonis non* of *Thomas Plampin*, deceased, for an account of moneys left by him, the original plaintiff, in the hands of the intestate at several times, and for which he never took any note, and which appear to have been allowed to the plaintiff in the original cause, *on his own oath*. They are as stated in the Reg. Book, 57*l.* 15*s.*, 57*l.* 15*s.*, 150*l.* 15*s.*, and 90*l.* and 24 guineas, and also the sum of 500*l.* R. L.

(2) Reg. Lib. 1684. B. fol. 134. But this last point does not appear. Et vide *Childrens* v. *Saxby*, ante 207.

Case 270.

Eodem die. In Court. Lord Keeper.

PUSEY *versus* PUSEY.

Land held by the tenure of a horn. Bill brought by the heir for the horn.

BILL was, that a *horn*, which time out of mind had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold their land by, might be delivered to him; upon which *horn* was this inscription, *viz. pecote this horn to hold huy thy land.*

The defendant answered as to part, and demurred as to other part; and the demurrer was, that the plaintiff did not by his bill pretend to be intitled to this *horn*, either as executor or devisee; nor had he in his bill charged it to be an *heir loome.*

The demurrer was over-ruled, because the defendant had not fully answered all the particular charges in the bill, and was ordered to pay costs. And the *Lord Keeper* was of opi-

nion, that if the land was held by the tenure of a *horn*, or *cornage*, the heir would be well intitled to the *horn* at law. (1)

Vid. 1 Inst. 107 a.

(1) Reg. Lib. 1684. B. fol. 310. No mention of costs. So a bill will lie for keeping undefaced, and restoring any subject of curiosity and antiquity; decreed on demurrer, *Duke of Somerset* v. *Cookson*, 3 P. Wms. 390. Et vide *Fells* v. *Read*, 3 Ves. 70. *Lloyd* v. *Loaring*, 6 Ves. 773. [*Lowther* v. *Lowther*, 13 Ves. 95. *Macclesfield* v. *Davis*, 3 V. & B. 16.]

SHERBORNE *versus* CLERK.

Case 271.

Eodem die.
In Court.
Lord Keeper.
Vid. ante Case 70.

DEMURRER to a bill brought to discover the tenant to the *præcipe* on a voluntary conveyance, allowed. (1)

Eq. Ca. Ab. 76, pl. 9. S. C. and S. P.

(1) The defendant pleaded a good title in his father to the lands in question, and quiet possession thereof by himself as heir to his said father for 22 years. The plea then states that the plaintiff had brought a writ of formedon in remainder against the defendant for the premises in question, and declared on a certain settlement in the bill mentioned; that to this writ the defendant had pleaded a fine and recovery suffered by his father, to which plea the plaintiff replied, and traversed that the defendant's father was tenant of the freehold, and that on the trial the plaintiff was nonsuited and judgment thereupon duly entered for the defendant: and this plea was allowed. Reg. Lib. 1684. B. fol. 112. Vide *Stapleton* v. *Sherrard*, ante 213.

SMITH *versus* TURNER.

Case 272.

Eodem die.

UPON a bill of review the error assigned was, that there was no ground for making this decree, more than that it is mentioned in the decree, that it was made by the consent of the plaintiff's counsel, and he ought not to be concluded by the consent of his counsel: and that was allowed to be a good error: (1) as also that the decree was made by the *Master*

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(1) But the court will not set aside a decree obtained by consent of counsel on both sides, *Harrison* v. *Rumsey*, 2 Vez. 488. *Bradish* v. *Gee*, Amb. 229. [*Mole* v. *Smith*, 1 J. & W. 673. and see *Wood* v. *Griffith*, 1 Mer. 38.] So infant bound by a decree taken by consent, though no reference to the Master, but not usually made without a reference, *Wall* v. *Bushby*, 1 Bro. Ch. Rep. 488. But the remedy lies for the party against his counsel, &c. And also against such a decree if obtained by fraud and covin, *Bradish* v. *Gee*, ub. sup.

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of the Rolls alone, and he cannot by his *commission* make a decree without the assistance of two *Masters*. (1)

Note. This case not being warranted by the record, it is thought fit to insert the words of the record itself, which are as follow, *viz.*

(1) Vide *Merreitt* v. *Eastwicke*, ante 265. And as to the judicial authority of the *Master of the Rolls*, as formerly considered, vide a book entitled, 'The 'Legal Judicature in Chancery Stated,' in which the question is much agitated, as to the force of a decree at the Rolls, at this time, stat. 3 Geo. II. cap. 30. Et vide *Brown* v. *Higgs*, 8 Ves. 561.

Jovis Vicesimo die Novembris, Anno Regni Carol' Secundi Regis Tricesimo Sexto, inter Edwardum Smith Bar' Quer', Anna Turner, Vid' Defend'.

Lord Keeper. THE matter upon the plea and demurrer put in by the said defendant to the plaintiff's bill of *review*, coming this day to be heard and debated before the Right Honourable the *Lord Keeper* of the Great Seal of *England*, in the presence of counsel learned on both sides, upon opening the matter of the said defendant's plea, which is grounded on a submission or consent of the now plaintiff *Smith's* counsel to a decree made in a former cause, wherein the defendant *Turner* was plaintiff, and the now plaintiff *Smith* defendant, and therefore the decree in the former cause, against which the plaintiff's bill of *review* seeks relief, being grounded on a consent, ought not to be impeached or prejudiced by the now plaintiff's bill. Upon debate of the matter of the bill, plea and demurrer, this court held the said plea and demurrer to be good and sufficient, and doth order that the same do stand and be allowed. (1)

(1) Reg. Lib. 1684. B. fol. 101.

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LLOYD *versus* GUNTER.

Case 273.

Eodem die. THE defendant had pleaded a former decree in bar to the plaintiff's bill: but the plea was not suffered to be opened,

Eq. Ca. Ab. 41, pl. 1. S. C.

Defendant cannot plead after a proclamation returned. Nor can a plea be taken upon a general commission to take the answer only.

for that it came in after a proclamation returned; and also came in by a general commission which was to take the answer only, and not to plead answer or demur. (1)

LLOYD v. GUNTER.

(1) This plea appears to have been referred to one of the six clerks not towards the cause, to examine and certify as to its being regularly taken and returned. Reg. Lib. 1684. B. fol. 77. But on an order to answer, plea held good, though demurrer not, *Anon.* 2 P. Wms. 464. *Roberts* v. *Hartley*, 1 Bro. Ch. Rep. 56. *Elme* v. *Shaw*, post 282. Nor a demurrer, though only to part, and answer to remaining part of the bill, *Kenrick* v. *Clayton*, 2 Bro. Ch. Rep. 214.

HILLS & Al' *versus* UNIVERSITAT. OXON. & Al'.

Case 274.

24 Novembris. In Court. Lord Keeper.

How far the *University of Oxford's* privilege of printing bibles, &c. extends.

IN the *eighth* year of King *Charles* the *First*, there was a patent granted to the University of *Oxford* to print bibles and other books not prohibited. 30 *Martij*, 8 *Car.* that patent is confirmed, and limits that there shall be but two presses and three printers. The plaintiffs claim as the *King's* printers, under several patents continued down by mesne assignments, and bring their bill to restrain the defendants from printing bibles, &c. And it was observed, that the *bible* was translated at the *King's* own charge; so that the copy was his; and that printing was brought in by *Henry* 6th at his own charge.

The *Lord Keeper* was of opinion, that it was never meant by the patent to the *University*, that they should print more than for their own use, or at least but some small number more, to compensate their charge: but as they now manage it, they would engross the whole profit of printing to themselves, and prevent the *King's* farmers of the benefit of their patent: however he said, the validity of the several patents was a matter proper to be determined at law, and the plaintiffs were now proper only for a discovery, and therefore ordered that the plaintiffs should bring an action at law in the *King's Bench*, against the *University*, or the defendants *Parker* and *Guy* who claimed under the patent to the *University*, and that it should be tried at the bar: and the defendants were to admit they had printed a competent number of bibles at the trial. (1) And though the plaintiffs pressed

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(1) And the plaintiffs' patent as King's printer, and the plaintiffs to admit defendants *Parker* and *Guy* to be well and truly constituted the University printers, vide *Anon.* ante p. 120, and cases cited in not. there.

HILLS v. UNIVERSITAT. OXON. & AL'.

Vid. ante Case 109.

much for an injunction to stay the *University* printers from going on with the printing of bibles until the trial had settled the right, yet the *Lord Keeper* refused to grant it, in regard that in case the right should be found with them, they would by such prohibition receive a prejudice, that he could not compensate nor make good to them. (1)

(1) Reg. Lib. 1684. A. fol. 766.

Case 275.

Eodem die.

Prohibition to an inferior court for holding plea of a matter out of their jurisdiction.

NEWHOUSE *versus* MILBANK.

A PROHIBITION granted to an inferior court upon a suggestion, that they held plea of a matter out of their jurisdiction. (1)

(1) Vide on this subject, *Cox's* case, 1 P. Wms. 29. *Anon.* ibid. 476.

Case 276.

27 Novembris. Lord Keeper.

Eq.Ca.Ab.268, pl. 6. S. C. Lands devised to be sold for payment of portions, one of the children dies after the portion becomes due, and before the land sold, the administrator is entitled to the money.

BARTHOLEMEW *versus* MEREDITH *alias* MOOREHEAD.

J. S. by will devises land to be sold for payment of portions to his younger children; one of the children dies after the portion becomes payable, but before the land sold.

Per Cur'. The administrator of the child that is dead, is entitled to the money. (1)

(1) The devise was to "Trustees "and their heirs upon trust, to sell "and to divide the moneys arising by "the sale amongst his four daughters if "then living, and if any of them should "be dead, and should leave any child "or children that the respective share "of such daughter or daughters so "dying should be equally divided "amongst the children of her or them "so dying:" two of the daughters died leaving issue, and of the issue of one of the daughters so dying two children died before the sale took place. This was a bill by the purchaser of the lands, and the sale was decreed, and the representatives of the two children who died before the sale declared entitled to their respective proportions of the purchase-money. Reg. Lib. 1684. A. fol. 155.

PALMER *versus* YOUNG.

Case 277.

Eodem die.

ONE of the three that held a lease under a dean and chapter, surrenders the old lease and takes a new one to himself.

Eq.Ca. Ab 380, (B) pl. 2. S. C.

Three lessees of a church lease. One renews in his own name.—It shall be a trust for all.

Per Cur'. It shall be a trust for all. (1)

(1) Reg. Lib. 1684. B. fol. 124. [So *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298.]

ATTORNEY-GENERAL *versus* VERNON, BROWN, and BOHEME.

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Case 278.

Eq. Ca. Ab. 75, pl.1. 133, pl.16. 2 Ch. Rep. 353. S. C.

Bill in equity lies to set aside letters patent obtained by fraud.

THE bill was, that his Majesty, in right of his Dutchy of *Lancaster*, was seized of the honour of *Tudbury*, the forest of *Needwood*, and of many other particular lands in the bill specified, and that the defendants had intruded and committed waste; sometimes alleging the lands descended to them or some of them from their ancestors; at other times pretending a grant thereof from his Majesty: whereas, if there was any such grant, it was obtained by surprise, and by false particulars; many things being omitted or not valued, and those that were valued, were much under-valued, and that it did not pass in the usual form of grants of inheritance under the *Dutchy* seal; and that endeavours were used to stop the grant, but without effect.

To this bill or information the defendants pleaded, that they had paid to his Majesty 7,000*l.* in money, and had conveyed to him the lands, whereon the fort of *Sheerness* was built, and that in consideration thereof, and of the King's special grace and favour, by letters patent under the *Dutchy* seal, executed by livery, in pursuance of a warrant under the *King's* signet, or sign manual, his Majesty did grant to defendants *Brown* and *Boheme* in the words following, (and then set out the letters patent); and the defendant *Vernon* averred, that, though the patent passed in the name of the other defendants, yet *that* was done to prevent a merger of several leases he had in part of the premises, and that, as he believed, the grant was intended in favour of him, who

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had served his *Majesty* and the late *King* with the hazard of his life, and had suffered much for them, both in his person and his estate; and that therefore, and for that letters patent could not be avoided by an *English* bill, but the matter in question was properly at law, and ought to be determined in the *Dutchy*, and that the defendants were purchasers, equity ought not to avoid their grant, or to put them to discover matters in avoidance of it.

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And by the defendants counsel it was insisted, *first*, That there never had been any precedent of this nature to repeal letters patent by an *English* bill in *Chancery;* but as to that, it was *causa primæ impressionis*. *Secondly*, that a title under letters patent is a title purely at law, and determinable there, and that likewise there is a proper remedy by *scire fac'*.—*Thirdly*, as there was no precedent of any such bill, so it was impracticable to proceed here, for that the letters patent pleaded, and all other letters patent, are matter of record, and cannot be disannulled, but by a matter of as high a nature: and the *English* side of the Court of *Chancery* is no court of record; and therefore letters patent cannot, neither can a fine, be vacated or cancelled by a decree on an *English* bill: but if any thing could be done on such bill, at most it could be but to decree a re-conveyance: and that was not prayed by the bill. *Fourthly*, it was observed, that the word *fraud*, which, if any thing, must give jurisdiction to the court in this case, was not in the whole bill; for that the whole charge of the bill goes but to two things only, *viz*. *First*, that the patent passed over-hastily, and had not its due progression through all the offices, as in the case of a grant of an inheritance under the *Dutchy* seal, according to the usage of that court, it ought to have had. And *secondly*, that this grant was obtained by misinformation and false particulars, or at least that his Majesty was not duly and fully apprized of the value of the lands, when this grant passed.

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As to the first of these objections it was said, that the grant passed duly, or not; if not, that would avoid the grant at law; and the usage of the *Dutchy* court is most properly determinable there: but if it passed regularly and according to law, there could be no objection upon that account against it in equity: and it was urged further, that though it might be reasonable, where there is a general warrant for a grant, that it should pass through all the proper officers hands, to the intent they might examine, and take

care, that the grant be not larger or more comprehensive than his Majesty intended it: yet where there is a warrant to pass a patent in *hæc verba*, (as in this case there was) there the particulars and manner of the grant is fixed and ascertained by the warrant, and there needs no such care or scrutiny of the officers about it.

As to the second objection; it was said, it had never yet been thought a reason sufficient to avoid the *King's* grant, because he did not receive a consideration adequate to the value of the land; for *Kings* are supposed to be bountiful, and not to make a bare *Smithfield* bargain: and though it should appear upon an examination in this court that there was an over-value, yet that would be no reason to avoid this grant, for that the grant is not only in consideration of the 7,000*l.* in money paid, and of the conveyance of the lands at *Sheerness*, but also of the *King's* special grace and favour; and the defendant *Vernon* has by his plea shewn himself to be a person, who had some title to the *King's* favour; he having served his Majesty and the late *King* with the hazard of his life, and suffered for their service both in his person and in his estate; and expressly avers, that the patent was intended in favour of him, though not taken in his name, to prevent a merger of his leases; and then when the value shall appear, how much shall be said to pass in respect of the *King's* bounty, and how much in respect of the consideration paid? Certainly whatever the over-value shall be, it ought to be imputed to the *King's* bounty; unless the law had prescribed limits (which it hath not) to the *King's* grace and favour. And it was further observed, that the defendant *Vernon* had several long leases of part of the premises, and in those leases [280] the rents reserved were thought a good consideration; and those leases were not yet impeached; and not only the same rents were continued, but an increase of rent was reserved on the grant of the inheritance: and so the same consideration goes to that too. 5*thly*. That there was a particular *non obstante* in the patent, that it should not be impeached for mistaking, or not mentioning the values; and a covenant for further assurance, in case the grant was any way defective; and that the force of such a *non obstante* was properly determinable at law. 6*thly*. If letters patent shall be impeached by English bill in *Chancery* upon such suggestions and pretences as these, no patentee can be safe; nor shall the *King's* seal be of any force; and unless the utmost consideration was paid, the grant shall be open to the best bidder; and

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after never so long an enjoyment the patentee shall be called in here, and entangled in proofs of the values of the lands granted: and since *nullum tempus occurrit regi*, nothing hinders but they may go back and repeal letters patent made by *King James*, or as much farther back as they please. *Lastly*. The defendants were purchasers, and had pleaded themselves so to be; and 7,000*l*. was actually paid, and their lands at *Sheerness* conveyed to the *King*; and therefore as purchasers, they were entitled to the protection of the court; and in case their grant was defective, they might possibly have an equity to have it supplied here: but there was no equity to destroy a purchaser's grant; neither was it the practice of this court to compel a purchaser to answer matters, whereby to impeach his grant; and if the defendants should be forced so to do, the consequence thereof might be, to strip them of their purchase, and yet be left without remedy for the consideration paid, and lands conveyed.

For the *King* it was insisted by the counsel, *first*, that in this case a bare purchase was intended, and not a gratuity; and that the letters patent were obtained in respect of the consideration paid, and not as of the King's bounty; for that would have much altered the case.

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2*dly*. As it was intended a purchase only; so it was unduly obtained by false particulars: and it was no small evidence of the fraud, that it was carried on in such haste, and by such unusual methods.

3*dly*. That the *King* in this case was properly relievable in this court by *English* bill. 1*st*. For that the *King* may sue in what court he pleases. (1) 2*dly*. The bill charges a surprise and false particulars; and a fraud is properly relievable here. 3*dly*. That the *King* ought not to be in a worse condition than a subject; and a *Nobleman* shall be relieved for such a fraud put upon him by his servant: and in case the *King* shall not be relieved in this case by an *English* bill, he will be without remedy. 1*st*. For that there is no remedy to be had in the *Dutchy* court; for that is only a court of *revenue*, and not a court of *law*; and for that cited *Owen* and *Holt's* case in my Lord *Hobart*, fo. 77, and the case of *Dowty* and *Fisher* in the *King's Bench*; and besides the complaint of the bill was, that the *Chancellor* of the *Dutchy* had not done well in this matter. 2*dly*. As this

1 Vent. 155.

(1) Vide *Magdalen Coll. Case*, 11 Co. Rep. 68 b. 75 a. *Boswell's* Case, 6 Rep. 48, mentioned Noy. 117.

case was, the *King* could have no remedy by *scire fac'* for that these patents were no record of this court: and for that in a *scire fac'* the deceit ought to appear within the body of the patent; but the matters upon which the bill seeks relief are frauds in obtaining the grant, and matters *dehors* the patent.

4thly. They said, there could be no such danger, as was pretended, to ancient patents; for that the equity will not be the same against an ancient patent, where there has been a long enjoyment under it, as against a patent newly passed, and fresh in agitation: and as to ancient patents, it shall be presumed the *King* intended a bounty, which will alter the case. As to what has been urged, that there was no precedent for such an *English* bill, it was said, there is no precedent of any grant of such value passed on such consideration. [282]

Lord Keeper. The question is short, whether there be a fraud, or not? if a fraud, it is properly relievable here. It is not fit such a matter as this should be stifled upon a plea; and therefore *Lord Keeper* over-ruled the plea, and denied to save the benefit of it till the hearing, because he would not give any countenance to such a case. (1)

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(1) Reg. Lib. 1684. A. fol. 109. *Case*, 11 Rep. 74. Et vide post 370. And in case of fraud the king shall not be bound, 27 Eliz. c. 4. *Mag. Coll.* S. C.

ELME *versus* SHAW.

Case 279.
8 *Decembris.*
In Court.
Lord Keeper.
Eq. Ca. Ab. 125, pl. 6.

DEMURRER allowed, but without costs, because it was a demurrer only, without any answer, and came in by commission. (1)

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(1) *Quære.* Over-ruled. Vide *Lloyd* v. *Gunter*, ante 275.

Case 280.

GOFFE *versus* WHALLEY.

Eodem die.

Money raised by the heir by sale of real assets before original filed, if assets in equity.

BILL brought against an heir to discover what assets he had by descent, and to subject money raised by sale upon alienation before any original filed, and to discover the trust of lands descended before the statute of *Frauds* and *Perjuries*, which makes the trust of an estate descended assets.

The defendant pleaded alienation before original bill filed, (1) and that the trust of an estate descended was not assets in his hands. (2)

But the *Lord Keeper* ordered he should answer, saving the benefit of his plea to the hearing. (3)

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(1) Sed vide stat. Fraudulent Devises, 3 & 4 Wm. III. c. 14. sec. 5.

(2) Vide *Creed* v. *Colvile*, ante 172.

(3) It appears that the defendant having been taken on a proclamation for want of an answer put in a demurrer to the bill, which being set down to be heard it was prayed by the plaintiff's counsel might be set aside, but defendant's counsel insisted the plaintiff had accepted the costs and thereby waived the contempt, and ought not to take advantage of the coming in of the plea, and did then offer to admit assets to satisfy plaintiff's demand, and to give his consent to the court in a week then next: but defendant's counsel afterwards refusing to stand to such offer and admit assets, it was ordered, that the demurrer be set down to be heard again, which coming on to be heard accordingly, was over-ruled. Reg. Lib. 1684. A. fol. 75, 104.

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Case 281.

ANONIMOUS.

Eq. Ca. Ab. 11, pl. 13. S. P.

Sums under 40*s*. allowed on the party's own oath, but then he ought to swear when, and to whom, and for what they were paid.

SUMS under 40*s*. to be allowed the party on his oath, but then he must in his affidavit mention unto whom paid, for what, and when. (1)

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(1) Vide *Wicherley* v. *Wicherley*, post 470. *Marshfield* v. *Weston*, post 2 vol. 176.

Case 282.
1 *Decembris.*
Lord Keeper.

DUNN *versus* ALLEN.

Per Cur'. An assignee shall not have a *scire fac'* to revive a decree that is not signed and enrolled: but after the decree is inrolled, an assignee may bring a *scire fac'* to revive it: in like manner as at law, if there be judgment for an annuity, and the annuitant afterwards sells the annuity, the vendee shall have a *scire fac'* upon this judgment. But though the *Lord Keeper* disallowed the *scire fac'* yet it was without costs, because the defendant might have demurred, but did not. (1)

An assignee cannot bring a *scire fac'* to revive a decree, unless the decree be enrolled.

(1) The defendants had appeared on the *sci. fac.* and put in several examinations by way of answers, wherein issue was joined, and witnesses examined, and defendants were at first ordered to pay the costs thereof, to be taxed, but afterwards on agreement, plaintiff was admitted to file his original bill, and defendants were to pay 20 marks costs for their irregularity, and, by consent, the depositions which had been taken on the *sci. fac.* between the parties were to be read on the original bill so to be filed. Reg. Lib. 1684. A. fol. 82. Vide post 426, S. C. *Hill* v. *Kent*, in Chan. Trin. 16 Geo. II. 1742. Mitf. Tr. p. 65. So assignee or devisee cannot file bill of revivor, but must proceed by original bill, in nature of a bill of revivor. So assignees under commission of bankrupt, *Harrison* v. *Ridley*, Com. Rep. 589.

Sir Harbottle Grimston, Master of the Rolls, *died about* three *o'clock in the morning on the* second *day of* January, *in the* eighty-first *year of his age, being seized suddenly in the night with a kind of an apoplectic fit, of which he continued ill about* four *days, and then died; and was about* three *days afterwards carried privately out of town to be buried at* Gorhambury. *Upon his death the* Lord Keeper *took the keys of the* Rolls *into his custody, until Sir* John Churchill *was appointed* Master of the Rolls, *and sworn privately at his* Lordship's *house.*

DE

TERMINO S. HILLARII,

36 & 37 *Car. II.* 1684.

IN CURIA CANCELLARIÆ.

Sir ROBERT JASON *versus* ELIZABETH JERVIS, Widow, and Al'.

Case 283.

24 *Januarii.*

In Court. Lord Keeper.

Nathaniel Bacon, the defendant *Elizabeth's* former husband, who headed the rebellion in *Virginia*, was owner of the lands in question, and contracts with the plaintiff *Jason* to sell him the lands for 1,200*l.* *Jason* has not money to pay for the purchase; but confesses a judgment of 4,000*l.* penalty, defeazanced for payment of the consideration money to *Bacon;* and thereupon *Bacon* conveys the lands to him and one *Pheasant* his trustee. *Thomas Jervis* contracts with *Jason, Pheasant* and one *Bucknam* for the lands for 1,200*l.* and *Jason, Pheasant* and *Bucknam* enter into a statute, that in consideration of 1,200*l.* they and all claiming by, from, or under them, or any or either of them, would convey the said lands unto *Jervis* and his heirs, free from all incumbrances done or suffered by them, any or either of them; and that *Bucknam*, who was in possession, should deliver possession unto *Jervis*, or in default thereof the 1,200*l.* was to be re-paid.

A. covenants, that in consideration of 1,200*l.* he and all claiming under him will convey to *B.* or pay back the money. A conveyance is made, and then *B.* is evicted by a jointress, who claimed under a settlement made by her husband the former owner of the estate. *B.* makes the jointress his executrix, and dies. *A.* shall pay back the money, and the executrix of *B.* shall have it and her jointure too.

Bacon dies in *Virginia*, and after his death his wife and children set up a settlement by which *Bacon* was only tenant in tail, and by virtue of this settlement they evict the estate from *Jervis*, who afterwards dies, and makes the defendant *Elizabeth* his executrix.

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For the plaintiff it was insisted, that although there was a general covenant to convey, yet it was restrained by the special words that come afterwards, *viz. free from all incumbrances done by them, any or either of them:* and a covenant by the word *concessi*, may be restrained by a subsequent spe-

JASON v. JERVIS.

cial covenant: and it appears by the whole contexture of the agreement, that the intent of the parties was only, that *Jervis* should take *Bacon's* title, *talis qualis*, and he by a recovery might have cut off the remainders, and have made a good title. And this is a case of very great extremity; for the wife of *Bacon* and her children run away with the land by virtue of this settlement; and she likewise will have the 1,200*l.* consideration-money, as executrix to *Jervis*.

Lord Keeper.—I take the covenant to convey to be a general covenant, and it cannot be supposed, that when a man buys the inheritance of an estate, he intended, that those he bought of should convey an estate for life only. And as to the other objection, that it would be a strange case for *Bacon's* wife to have both the money and the land too; there is no weight in that objection; for she has an estate for life in the land by the settlement; and she has the money as executrix to *Jervis*: *et quando duo jura in uno conveniunt, æquum est, ac si essent in diversis.* (1)

But then the plaintiffs' counsel pressed, they might be admitted to try again the reality of this settlement, whether it was not fraudulent; the former trials having been in *Bucknam's* name, who was a known cheat, and his name cast an odium on the cause.

Whereupon it was ordered they should try it next *assizes* in an ejectment: and first against the wife, as to her estate for life; and then as to the remainders to the children: for if the bond before marriage was only for a jointure, and the settlement goes further, and entails the land upon the children of the marriage, the settlement might be good as to the jointure, and fraudulent as to the remainders in respect to a purchaser. (2)

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A bond before marriage to settle a jointure, and afterwards a settlement is made which settles the estate on the wife and the issue of the marriage —This settlement is good as to the jointure, but fraudulent as to the children in respect of a purchaser.

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(1) Vide illustrations of this doctrine *Acton's* Case, 4 Rep. 118 a. *Calvin's* Case, 7 Rep. 2 b. 3 Inst. 134. *Meredith* v. *Jones*, post 463. [*Coppin* v. *Coppin*, 2 P. Wms. 291.] And where by articles made on marriage of an infant in consideration of 3,500*l.* then paid to the husband, a suitable jointure was to be made on her when of age in bar of dower, and she was to convey her lands to be limited to the husband in fee, the jointure was settled, and the wife when of age was a party to the deed, but she never conveyed her own estate, nor was she ever required so to do by her husband, though her dower exceeded her jointure. The husband died, and the wife entered upon the settled lands. Held that she was not bound by the articles, nor by her acceptance of the jointure, she therefore kept her own estate and the jointure also, *Lucy* v. *Moore*, Mose. 59. 3 Bro. P. C. 514.

(2) The bill in this case stated that *Bacon* applied to the plaintiff being a

young heir, and necessitous, and proposed to sell him the lands in question, being of the yearly value of 150*l.* and to take security for the payment of the purchase-money after the death of the plaintiff's father, and that thereupon the plaintiff gave a judgment for 8,000*l.* defeazanced for payment of 4,000*l.* at his father's death, and thereupon a conveyance ready ingrossed wherein the name of *Pheasant* was used as purchaser, being an utter stranger to the plaintiff, was executed by *Bacon*, and taken by one *Bockenham* into his custody for the plaintiff's use, and no trust was mentioned in the deed. *Bockenham* then applied to the plaintiff, and offered to purchase the said lands of him, and upon his paying the plaintiff 50*l.* and promising to pay the full value, plaintiff executed a conveyance thereof to him. *Bockenham* gave some security for the payment of the remainder of the purchase-money, and several incumbrances were set on foot, afterwards *Bacon* agreed to discharge the aforesaid judgment, and to accept a re-conveyance if the plaintiff would undertake to procure one, or else that the plaintiff would pay 1,250*l.* with 60*l.* *per annum* in lieu of rents, in the mean time; which the plaintiff undertook to do. But before the said agreement was executed *Bacon* went beyond seas and died, and the defendant *Jervis* claimed the benefit of the said agreement, the plaintiff not having taken in *Bockenham's* interest, nor obtained any re-conveyance from *Pheasant*. The plaintiff thereupon gave the defendant *Jervis* a judgment for 2,000*l.* (the former judgment being released) defeazanced for the plaintiff putting the defendant *Jervis* within a time therein mentioned in quiet possession of the lands in question, and in the mean time to pay 60*l.* *per annum* half yearly, and make satisfaction for such damages as should come upon the premises, and in default thereof within three months after the time at which it was agreed possession should be delivered to pay 1,250*l.* to defendant *Jervis*, his heirs or assigns. The plaintiff got in *Bockenham's* interest and took a re-conveyance from *Pheasant*, but did not convey to *Jervis* at the time appointed, but he afterwards offered to convey and pay the rent, and deliver possession with reasonable damages, which the bill prayed he might accept. *Jervis* by his answer stated a purchase by him from *Bacon* of the premises in question, without any knowledge of the transaction between the plaintiff and *Bacon*, and payment to *Bacon* of 1,500*l.* the purchase-money for the same, and that *Bacon* covenanted that he and his wife would further assure as defendant's counsel should advise; that defendant afterwards being informed of the transaction between the plaintiff and *Bacon* agreed to accept a conveyance from the plaintiff, and the other parties on the terms mentioned above, and that such agreement was not performed on the part of the plaintiff, and that *Bockenham* made great waste on the premises, and claimed 1,250*l.* and damages. The defendant *Elizabeth Jervis* claimed her jointure out of the lands in question, under a settlement made by *Nathaniel Bacon* thereof on his marriage in consideration of her portion, and the court at the hearing declared *Jervis* to be a *bonâ fide* purchaser, and decreed the judgment to stand for performance of the agreement between him and the plaintiff, and that on payment of the said 1,250*l.* and interest from the time at which the defendant *Jervis* was to be let into possession by the terms of the agreement, together with the defendant *Jervis's* costs to be taxed both at law and in equity, the defendant should re-convey the premises to the plaintiff, and on default of payment the plaintiff's bill to be dismissed with costs, to be taxed, and the Master was ordered to enquire and report whether any and what part of the 1,500*l.* the defendant *Jervis's* purchase-money was retained by him, and for the amount of so much (if any) thereof as should appear to be so retained, the plaintiff was to have an allowance and deduction on the said account, 22d Nov. Reg. Lib. 1684. A. fol. 100. But nothing said in the decree respecting the jointure claimed by the defendant *Elizabeth Jervis*. On this decree

the plaintiff petitioned for a re-hearing, principally on the point of the validity of the settlement, when a trial at law was ordered as stated, and at that trial the defendants were to admit the plaintiff to be a purchaser for a full consideration of the lands in question from *Nathaniel Bacon*, Reg. Lib. 1684. A. fol. 354. Vide *Brunsden* v. *Stratton*, Pre. Ch. 520.

Case 284.

Eodem die.

In Court.

PRESTON *versus* TUBBIN.

What shall be reckoned a sufficient *lis pendens*, and what not.

WHERE a man is to be affected with a *lis pendens*, there ought to be a close and continued prosecution. In this case the bill was to compel the father to perform articles made on his son's marriage; the father mortgages the land, that was to be settled, pending the suit; and the mortgagees are thereupon made parties, and then the father dies.

Lord Keeper.—Here the *lis pendens* is well enough; for the plaintiff being heir, he cannot revive the suit against himself.

It was said by Mr. *Solicitor*, that where there is a *lis pendens*, as if a man has exhibited his bill to have articles performed, there he may by an original bill affect a third person with notice of the first suit, that shall come in and purchase the estate pending that suit; and that there are forty precedents of it in this court; for otherwise, though a man has proceeded never so cautiously, and immediately exhibited a bill to have articles performed, yet a stranger may come in, in the mean time, and prevent him of the estate.

But that was denied by Mr. *Keck*, and by the court; who said, that with actual notice you may affect any one by an original bill; but as to notice purely by a *lis pendens* you shall not affect any one, who is no party to the suit by an original bill; unless the former cause has proceeded to a decree: and there is not that danger in the case, as Mr. *Solicitor* apprehends; for if the first suit be proceeded in with effect; all persons that come in *pendente lite*, though they be no parties to the suit, their interest shall be bound, and avoided by the decree in that cause.

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Where notice to the party's counsel, is notice to the party.

And the *Lord Keeper* said, though notice to a man's counsel be notice to the party; yet where the counsel comes to have notice of the title in another affair, which it may be, he has forgot, when his client comes to advise with him in a

case with other circumstances; that shall not be such a notice, as to bind the party. (1)

(1) Vide *Harvey* v. *Montague*, ante 57, 122. *Anon.* post 318. *Mead* v. *Lord Orrery*, 3 Atk. 243. *Worsley* v. *Earl of Scarborough*, ibid. 392. So acts of the court are to be taken notice of by every one at his peril, as of a *lis pendens*. *Herbert's* case, 3 P. Wms. 116. A bill for establishing a will and perpetuating testimony is a *lis pendens*. *Garth* v. *Ward*, 2 Atk. 174. Et vide *Ashley* v. *Baillie*, 2 Vez. 370. *Lowther* v. *Carlton*, 2 Atk. 242. *Note.*—In this case the parties agreed that the mortgagee who was charged with notice of the suit should be paid his principal and interest, he not insisting on his costs, and decreed accordingly, Reg. Lib. 1684. B. fol. 297. *N. B.* The cause is entered in the Register's Book under the name of *Preston* v. *Preston*.

FITTON *versus* COM' MACCLESFIELD.

Case 285.

26 *Januarii.*

In Court. Lord Keeper.

No limitation of time for bringing a bill of review; yet after a long acquiescence under a decree the court will not reverse it but upon very apparent errors. (1)

THE plaintiff *Fitton* having brought a bill of review to reverse a decree made by the *Lord Chancellor Clarendon*, about 22 years since, the defendant the Lord *Macclesfield* demurred, and also pleaded to the bill of review.

Upon the pleadings in the cause, it appeared that the Lord *Macclesfield*, in *Easter Term*, 1661, exhibited his bill, thereby setting forth, that Sir *Edward Fitton* being seized in fee of the estate in question, settled this estate upon himself for life, remainder to all his sons successively in tail male, in case he should happen to have any, with a remainder to the Lord *Macclesfield*, who was his nephew, and the heirs male of his body, but subject to a power of revocation by deed or will. That afterwards Sir *Edward Fitton* made his will, and thereby devised the lands to the Lord *Macclesfield* in fee, who therefore prayed by his bill to have the trust of a term, that was to attend the inheritance, assigned to him: and complained that *Fitton* and the other defendants pretended to set up several titles to the premises.

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In answer to this bill, the now plaintiff, Mr. *Fitton*, set forth, that subsequent to the settlement in the bill, Sir *Ed-*

(1) Vide *Norris* v. *Le Neve*, 3 Atk. 38. *Skerrington* v. *Smith*, 1 Brown P. C. 95. *Smythe* v. *Clay*, 6 Bro. P. C. 395.

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ward Fitton made another settlement, and thereby limited the estate to himself for life, remainder to all the sons he should after happen to have in tail male, with remainder to the now plaintiff and his heirs, but with a power of revocation by deed or will: and that he did not know, that Sir *Edward Fitton* made any such will, as was pretended, neither was it material, for that the said Sir *Edward Fitton* in his lifetime by deed poll, bearing date the *third* day of *April*, 18 *Car'* 1, released the power of revocation in the last settlement.

The cause was heard the 13th *January*, 1662, and a trial directed to be tried at the *King's Bench* bar, touching the reality of this deed poll, which upon a long and full evidence was there fonud to be forged; and thereupon they came back into this court, and the will being fully proved here by witnesses, a decree was made for the plaintiff the Lord *Macclesfield*, and an account of profits directed, and the deed poll was ordered to be brought into court; but a twelve-months time was given to Mr. *Fitton* to try his title; and in case he should think fit to try the same, an officer of the court was directed to attend at such trial with the deed. (1)

Afterwards Mr. *Fitton* within the *twelve* months brought his ejectment in the county of *Chester*, and upon full evidence a verdict passed for the Lord *Macclesfield*, who thereupon came back into this court, and the decretal order was made absolute.

In the bill of review the principal errors assigned were,

First, That this was a title proper at law, and that a man

[289] ought not to be concluded in a title which concerns the inheritance, upon a single verdict, and especially in a feigned issue, where the whole title could not come in evidence.

2*dly*. That the Lord *Macclesfield's* title was under a will, and there had never been any trial touching the reality of this will. (2)

3*dly*. The plaintiff *Fitton* was sent to trial under a great prejudice; the deed poll being called in the order a pretended deed; by reason of which reflection the trial could not be a fair or equal trial.

4*thly*. That here was an account of profits directed, and a decree made before any trial had, which was preposterous.

5*thly*. That here the deed poll was damned; whereas

(1) Vide *Frankland* v. *Hampden & Al*, ante 66.

(2) Vide autem post 293. The will proved at the trial.

some of the remainder men, that claimed by this deed, were no parties to the suit.

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To this bill of review the Lord *Macclesfield* pleaded and demurred.

The plea was, that Mr. *Fitton*, (though he had taken no notice of it in his bill) having by the decretal order twelve months time given him to try his title, he afterwards brought his ejectment in the county of *Chester*, where the whole title on both sides came in issue; and that upon a full and long evidence a verdict passed for the Lord *Macclesfield*, by a jury of the best gentlemen in the county.

The demurrer was, because there was no error in the decree; it being grounded upon two verdicts; and that the court had a proper jurisdiction of the cause; there being a long term out in trustees to attend the inheritance: and that now after twenty-two years acquiescence under the decree, and when all the witnesses to the will were dead, the plaintiff ought not to be admitted to his bill of review; and especially, for that he had not paid the costs of the former suit. (1)

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For the plaintiff it was said, that a bill of review is not barred by length of time, (*but by some at the bar it was said, that a fine and non-claim would have been a bar to the bill of review, if* Fitton *had not been in prison*) (2) and that the title was properly a title to be tried at law, and yet had never been tried; for as to the trial in the *King's Bench*, that was only in a feigned action, where the validity of the will could not come in question; and they were also sent to a trial under a prejudice; the deed poll being called a pretended deed: and as to the other trial, there was an ejectment indeed brought; but there Mr. *Fitton* was under the same prejudice as to the deed; and he could not make use of the depositions of some witnesses that were dead, the bill and answer not being brought down: so that in truth the validity of the will was never fairly tried; but supposing there had been one trial, and a verdict upon evidence against Mr. *Fitton*, yet a title at law ought not upon that to be perpetually bound up by a decree of this court; for that were to make a verdict in ejectment as peremptory, as a recovery in a writ of right: but all that the court ought to

Whether a fine and non-claim is not a bar to a bill of review.

(1) Vide ante 264, S. C.

(2) A fine and non-claim allowed a good bar to a bill of review, per *Hutchins*, Lord Commissioner. *Lengard* v. *Griffin*, post 2 vol. 190.

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have done in such a case, had been to have set the trust term aside, and have left the parties to law: and suppose a bill was now brought in this court, suggesting that a title was disputed at law, and should pray that for peace sake a trial in ejectment might be made as peremptory, as a recovery in a writ of right: without doubt a demurrer would lie to such a bill.

2*dly*. This decree was unjust, to damn the deed poll, because that the remainder men were not parties: and though [291] Mr. *Fitton* could not fully prove his title, yet the remainder men might; and by that means the court might be engaged to make repugnant decrees.

3*dly*. That here an account of profits was decreed before any recovery at law, and yet at the same time Mr. *Fitton* had a year's time given him to try his title, which was preposterous: and an account of profits was not so much as prayed by the bill; and a decree ought to be but *secundum formam petitionis:* and had the bill been as general as the decree, a demurrer would have lain as to any relief for an account.

For the defendant it was answered, that as to what was objected, that the remainder men were no parties, that was no error to be assigned by this bill; because those, that were not parties to the decree, could not be barred by it; neither could they have any bill of review of that decree.

2*dly*. As to the objection, that it was a title purely at law: that was a mistake; for there being a trust of a term to attend the inheritance, this court had undoubtedly a proper jurisdiction.

3*dly*. That whereas it was objected that the validity of the will had never come in question; that was also a mistake; for in the ejectment brought by Mr. *Fitton*, where the defendant, as well as the plaintiff, was to make a title; the validity of the will came properly in question; for the *Lord Macclesfield* could make no title, but by the will; the prior settlement with a remainder to him being with a power of revocation, the subsequent settlement to Mr. *Fitton* revoked that; so that upon the ejectment, not only the validity of the will but the reality of the deed poll came again in question: for had either the deed poll been found real, or the will not well proved; in either case the *Lord Macclesfield* could have had no title: and where the court has a jurisdiction by reason of a trust, it has not been unusual to make a decree upon one trial: as in the case of the Lord *Howard:*

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and this case is much stronger, the will having been fully proved in this court, (for so the decretal order is) and also attempts made to set up a forged deed, and for that reason in Sir *Thomas Williams's* case, a decree was made upon one trial to damn a forged deed.

And as to what was objected, that the decree was larger than the bill, it was answered, the bill was upon the whole case, and relief prayed in the premises: and they also insisted on the length of time, and that their witnesses were dead; as also, that the plaintiff had not paid his costs: for though the *Lord Keeper* had made an order to dispense with it, yet that ought to have been set forth in the bill of review; which in this case was not done.

Order for dispensing with costs upon bringing a bill of review, ought to be set out in the bill.

Per Cur'. When a decree comes to be reversed on a bill of review, it ought to be either because it was unjust in matter of law arising within the body of the decree; or for that the court wanted, or exceeded, its jurisdiction: neither of which objections were made out in this case; for the court had a plain jurisdiction by reason of the trust of the lease: and without doubt this court has a natural jurisdiction in the case of *forgery;* this being the proper court to detect it in, where you may have time to inspect the deed, and to sift the witnesses, which the proceedings at a trial at law do not admit of: and then the court having a natural jurisdiction, it is only matter of discretion, whether to send it to a trial at law or not; (1) and in case the deed poll had been damned without any trial, yet it had not been error. And it being made out that there was a forgery in the case, the *Lord Keeper* said, he did not wonder the court inserted some reflections in the order in *odium* to the forgery. And as to what was objected, that the court ought only to have set the term of years aside, and to have left the parties to law; which is the only material objection: he said, he did not think the court was bound so to do. No question but a [293] bill of peace to prevent multiplicity of trials is a proper bill; (2) though had the matter been *res integra*, he should not have made altogether such a decree to have bound the

A decree ought not to be made to bind the inheritance, where there has been but one trial at law. (3)

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(1) *Gilbert* v. *Emerton*, post 2 vol. 503.

(2) Vide *Ewelme Hospital* v. *Andover*, ante 226. and cases cited in not. there.

(3) So *Edwin* v. *Thomas*, post 2 vol. 75.

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inheritance, after the lease expired, upon one trial; but he observed, there was the greater reason for it in this case; because Mr. *Fitton* declined controverting the will, and rested upon the deed poll for releasing the power of revocation: and though there was but one trial, wherein the will could properly come in question; yet he well remembered, that upon the trial of the forgery in the *King's Bench*, Doctor *Smallwood* was produced, and he there proved the will: and though there be no limitation of time to the bringing a bill of review; yet after *two* and *twenty* years he should not reverse a decree, but upon very apparent and flat errors; especially this decree having been made by the Lord *Clarendon*, who well understood the rules of justice and equity, (and by Mr. *Keck* no decree of his was ever yet reversed) and there having been since his time several other *Keepers* and *Chancellors*, and no bill of review brought, he did not see cause after this length of time when the witnesses to the will were dead, (which whether made or not, is only matter of fact) to reverse this decree; and therefore dismissed the bill of review. (1)

(1) Reg. Lib. 1684. A. fol. 318. It appears by the Register's Book that an order was afterwards obtained for a re-hearing of the above-mentioned plea and demurrer, and on motion it was ordered that the plaintiff should procure the same to be set down for such re-hearing the first day of causes and exceptions after the term, or in default thereof such order for re-hearing is discharged, Reg. Lib. 1684. A. fol. 253. N. B. It does not appear again.

Case 286.

MORGAN *versus* DOM' SHERRARD.

26 *Januarii.*

A man possessed of a term for years, mortgages it, and then becomes indebted, first by statute, and afterwards by judgment, and dies. The judgment shall be first satisfied out of the equity of redemption of the term.

A MAN possessed of a term for years, makes a mortgage of this term to *J. S.* and afterwards acknowledges a statute to the Lord *Sherrard*, and then confesses a judgment to the plaintiff *Morgan*.

The bill was to have the equity of redemption of this term, which was vested in the executor, and so become assets, to be administered in a course of administration, and subjected to the judgment; a judgment in course of administration at law being to be preferred to a statute.

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For the defendant, the Lord *Sherrard*, it was insisted, that he had the statute, and that having got the term extended in the hands of the executor, a subsequent judgment could not avoid that extent: and his counsel alleged, there was a case in *Anderson* to that purpose: but the counsel on the other side denied there was any such case.

And the *Lord Keeper* was of opinion, that a term for years was not extendable by the conusee of a statute in the hands of an executor; and though it be extendable in the lifetime of the conusor in his hands, yet the extent is but *quousque*, and if the conusor alien the term before extent, the statute binds not the term; (1) and then if it be not extendable in the hands of the executor, it is but a chattel, like a jewel or a horse, and there a judgment must be preferred in course of law to a statute.

The case of *Fuller* and *Guilmore* was admitted, that a prior statute extended shall not be avoided by a subsequent judgment, but that is in the case of a freehold, and not as to goods or chattels.

Vid. 2 And. 157. 3 Cr. 734. 822. 4 Co. 59 b.

(1) So it seems the goods and chattels cannot be extended in the hands of a grantee, 30th Edw. III. 23 b. Vin. Ab. 19. 554.

DOLIN *versus* COLTMAN.

Case 287.

3 *Februarii.*

In Court.

THE wife joins with her husband in a mortgage, and levies a fine, to the intent to bar her dower, and in consideration thereof the husband agrees the wife shall have the redemption of the mortgage: and the husband afterwards mortgages this estate twice more.

Eq. Ca. Ab. 148, pl. 1. 219, pl. 7. S. C.

The wife joins in a mortgage, and levies a fine to bar her dower, and in consideration thereof, the husband agrees the wife shall have the equity of redemption in lieu of her dower, and afterwards he makes a second mortgage.

The court took this agreement to be fraudulent, as against the subsequent mortgagees, so far as to entitle the wife to the whole equity of redemption: but in regard the wife, in confidence of this agreement, had levied the fine, and thereby barred her dower, and the husband and wife being both living, the court decreed that after the husband's decease, the wife, in case she should happen to survive him,

This agreement is fraudulent as against the second mortgagee; so far as to entitle the wife to the whole equity of redemption; but decreed she should have her dower, notwithstanding the fine.

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should enjoy her dower: and whereas the mortgagees pressed, that the decree might only be, that she should enjoy her dower, notwithstanding the fine; the court thought it unreasonable in this case to put the wife to her writ of dower; because they might convey away the estate, and she not know against whom to bring her writ of dower. And therefore decreed the dower to her. (1)

(1) Vide Sir *John Packington* v. *Barrow*, Pre. Ch. 216. *Penne* v. *Peacock & Ux.*, Forr. 41.

Case 288.

Eodem die. In Court.

BOOTH *versus* RICH.

Eq.Ca.Ab. 280, pl. 3.

An infant cannot be foreclosed without a day to shew cause. But the proper way is to decree a sale, and that binds the infant.

PER CUR'. There being an infant in the case, we cannot foreclose him without a day to shew cause, after he comes of age: (1) but the proper way in such a case is, to decree the lands to be sold to pay the debts; and that will bind the infant. (2)

(1) So *Mallack* v. *Galton*, 3 P. Wms. 352. But the infant is only entitled to shew error in the decree, he may not unravel the account, nor is he entitled to redeem, ibid. But a feme covert is foreclosed absolutely, and shall have no time to shew cause after the death of her husband, ibid.

(2) Reg. Lib. 1684. A. fol. 413. And so held on a decree where a devise to sell for payment of debts, in regard the descent is broken, *Cooke* v. *Parsons*, post 2 vol. 429. Et vide *Lord Falkland* v. *Bertie*, post 2 vol. 342. Harr. Ch. Prac. 79. *Sayle* v. *Freeland* and *Al'*, 2 Vent. 351.

Case 289.

4 Februarii.

COM. NEWBURGH *versus* BICKERSTAFFE.

Eq. Ca. Ab. 7, pl. 10. 280, pl. 1. S. P.

An infant shall have an account of profits against an intruder, &c. But where there is a verdict against the infant's title, he can have no account till he has recovered at law.

THIS cause came this day to hearing; and upon the pleadings it appeared to be a pure title at law, and rested upon this single point, whether the marsh lands in question were Dutchy lands or not; the Lord *Newburgh* claiming by a patent under the Dutchy seal in King *James's* time, and the defendant Sir *Charles Bickerstaffe* claiming under a patent in King *Charles* the *First's* time, granted unto the Duke of *Richmond* under the great seal; so that if they were Dutchy

But the bill retained and a trial in ejectment directed.

lands, they were well passed to the Lord *Newburgh*; but if not Dutchy lands, but *derelict* lands, then they were well passed to the Duke of *Richmond*; and as to the jurisdiction of this court in the case, it was insisted, that the plaintiff being an infant, no laches should prejudice his right, and therefore the plaintiff's bill, though he was an infant, was proper for an account of profits in this court.

The *Lord Keeper* observed, that *Littleton* says, if a man intrudes upon an infant, he shall receive the profits, but as guardian; and the infant shall have an account against him in this court, as against a guardian: (1) but to that it was answered, that in this case a verdict had passed against the infant; and that binds his right, as to an account of profits; and that the possession was recovered in the lifetime of the infant's father; and in such case laches would run upon an infant; and besides the plaintiff was not proper for an account here, until he had first recovered at law.

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But the court retained the bill, and directed there should be a trial in ejectment at the *King's Bench* bar next term. (2)

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(1) Vide *Lord Falkland* v. *Bertie*, post 2 vol. 342. *Hutton* v. *Simpson*, ibid. 724. Et sic dict. arg. *Bennett* v. *Whitehead*, 2 P. Wms. 645. As to the grounds of the interference of this court in transactions between guardian and ward, vide cases cited by Mr. Cox in note (1) *Duke of Hamilton* v. *Lord Mohun*, 1 P. Wms. 121.

(2) Reg. Lib. 1684. A. fol. 408. Note.—The letters patent by which the lands in question were granted as Dutchy lands, were under the dutchy seal and the great seal.

THYNN *versus* THYNN.

Case 290.

9 *Februarii.* *In Court.* *Lord Keeper.*

Eq. Ca. Ab. 380, pl. 6.

A man makes his will, and his wife executrix: the son afterwards prevails on his mother to get the father to make a new will, and to name him executor, he promising to be a trustee only for his mother. Trust decreed, notwithstanding the statute of Frauds, &c.

THE case was, that Mr. *Thynn*, of *Eagham*, deceased, having made a will, and thereby made his wife sole executrix; the defendant Mr. *Thynn* the son, hearing of this will, came to his mother in the lifetime of his father, and persuaded her, that there being many debts, the executorship would be troublesome to her; and desired that he might be named executor; for that he by reason of his privilege of Parliament could struggle the better with the creditors, and persuaded his mother to move his father in it; declaring that

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he would be only an executor in trust for her: and the mother accordingly prevails on the father that it might be so: and thereupon Mr. *Thynn* the son gets a new will drawn, whereby a legacy of 50*l.* only is given to his mother, and therein he makes himself sole executor; and cancels the former will, though the father opposed the doing thereof; and the last will was read over so low, that the testator could not hear it; and when he called to have it read louder, the scrivener cried, he was afraid of disturbing his worship.

[297] The defendant having thus made himself sole executor, and procured this will to be executed, where only a legacy of 50*l.* was given to his mother, set up for himself, and denied the trust for his mother: and in his two first answers he denied the will was drawn by his directions, and that the 50*l.* therein given to his mother was without the testator's privity; but in his third answer he confessed it.

Upon the whole matter, it appearing to be, as well a fraud, as also a trust, the *Lord Keeper*, notwithstanding the statute of *Frauds* and *Perjuries*, (1) though no trust was declared in writing, decreed it for the plaintiff, and ordered that the defendant should be examined on interrogatories for discovery of the estate. (2)

(1) The statute seems to relate only to trusts concerning lands and hereditaments, vide stat. 29 Car. II. cap. 3. Vide *Devinish* v. *Baynes*, Pre. Ch. 3. *Selwyn* v. *Selwyn*, 11 Dec. 1758, before *Henley*, Lord Keeper, L. I. Hall.

(2) The defendant was to pay costs to the hearing, to be taxed by the Master out of his own estate, not to wait the taking the account, Reg. Lib. 1684. B. fol. 259. [See further as to the relief against frauds of this description, *Chamberlain* v. *Chamberlain*, 2 Freem. 34. *Reech* v. *Kennigate*, Amb. 67. 1 Vez. 123. *Chamberlain* v. *Agar*, 2 V. & B. 259, and cases there cited; *Dixon* v. *Olmius*, 1 Cox, 414.]

Case 291.
Eodem die.
In Court. Lord Keeper.
Eq. Ca. Ab. 7, pl. 12. 372, pl. 1. Skin. 205. S. C.

STRELLY *versus* WINSON.

THERE being *three* part-owners of a ship, one of them refuses to fit out the ship to sea, (1) and the others do it without his consent, and the ship is lost in the voyage.

Three part-owners of a ship.—One refuses to navigate the ship; and the other two do it against his consent, and the ship is lost in the voyage.

(1) The ground of the refusal as stated in the Register's Book by the bill was, that defendants the other part-owners had not come to any account with the plaintiff for former voyages. This was denied by the answer. R. L.

STRELLY v. WINSON.

Per Cur'. In this case the loss of the ship shall be equally borne by all three; for though one of the partners did not consent to the fitting out of the ship, yet he would have been entitled to one-third part of the freight, and in this court should have had an account of the third part of the profits of that voyage: (1) and so where one tenant in common receives all the profits, he shall account in this court as bailiff to the other two for two-thirds. But in case the other two part-owners had applied to the Court of *Admiralty*, as regularly they ought to have done, that court would have made an order, that upon one part-owner's refusing to navigate the ship, the other two should have liberty to do it alone, and should not have been accountable to the part-owner, that refused to join, for any part of the profits: and there in case the ship had been lost, the whole loss must have rested on those two, that set out the ship: but in the present case, in regard the third person, who refused to join with the other two, would have been entitled to a share of the profits of the voyage, if any had been made by the ship, he ought to bear his proportion of the loss. *Qui sentit commodum sentire debet & onus.* (2)

He, that refused to join, shall bear his proportion of the loss; for he would have been entitled to a share of the profits, if there had been any.

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(1) Vide *Justice* v. *Brown* and *Al'*, Hard. 473. *Anon.* Skin. 230. *Knight* v. *Parry*, Carth. 26. Shower 13. *De Grave* v. *Hedges*, 2 Raym. 1285. *Anon.* 2 Ch. Ca. 36. *Boson* v. *Sandford* & *Al'*, Shower 30. Et vide Abbott's Law relating to Merchant Ships, 4th Edit. p. 91, et seq. and cases there cited. *Horn* v. *Gilpin*, Amb. 255, where said the printed report of this case in Skinner 205, is the correct report; and note (2) at the latter end of this case in the next page. Where the major part of the owners settle an account of the profits of a voyage, it shall conclude the rest. *Robinson* v. *Thompson*, post 465.

(2) But the court upon this point did not think fit to direct any account touching the same, *there being no sufficient countermand*, and as to that matter the bill was dismissed. Reg. Lib. 1684. B. fol. 303.

HALL *versus* DOWTHWAITE.

Case 292.
11 *Februar.*
In Court.
Lord Keeper.

THIS case concerned lands within the county palatine of *Durham*; and in order to entitle this court to jurisdiction of the cause, the bill suggests prior incumbrances to parties, that lived out of the jurisdiction: but when the cause came

Suggesting prior incumbrances to persons living out of a *county palatine* will entitle this court to a jurisdiction concerning lands within the *county palatine*.

to hearing, no such matter was made out by proof; but it appearing that the proceedings in the county palatine had been unjust, the *Lord Keeper* said, he would retain the cause, and consider of it. (1)

(1) An order was made, it being matter of title, that a trial should be had in pursuance of two former orders for that purpose. Reg. Lib. 1684. A. fol. 301. No further order appears, vide *Strode* v. *Little*, ante p. 58. *Earl of Arglass* v. *Muschamp*, ante p. 75, and cases cited in not. there. Sir *James Johnson* v. *Desmineere*, ante 223.

Case 293. KETTLEBY *versus* ATWOOD.

Eodem die. *In Court.* *Lord Keeper.*

Eq. Ca. Ab. 273, pl. 5.

Money agreed on marriage to be laid out in land and settled to the use of husband and wife, and their issue, with remainder to the husband in fee. The husband dies leaving a son, who died without issue. The heir of the husband brings a bill against the wife, who is administratrix of her husband and son to have the money laid out and settled according to the articles. Bill dismissed.

By articles made upon marriage it was agreed, that the wife having 1,500*l.* portion, the husband should add 500*l.* more to it, and that the same should be deposited in trustees' hands, until a convenient purchase could be found out for investing the same in land; which land, when purchased, was to be settled to the use of the husband and wife for their lives, remainder to the first and other sons of their two bodies in tail, remainder to their daughters in tail, (1) with a remainder over to the right heirs of the husband. And in the articles there was a proviso, that in case the husband died without issue, the wife might make her election, whether she would have the land or money, and had six months time to make her election. (2)

[299] The husband died before any purchase was made, leaving the wife *enseint* of a daughter, born soon after his death, who died at a month old. The wife was administratrix both to her husband and child, and made her election within the *six* months to have the money, and gave notice thereof to the plaintiff, who was her husband's brother and heir.

(1) This remainder to the daughters in tail is not inserted in the Register's Book.

(2) The money by the articles in the mean time until purchase of land was to be put out at interest for the benefit of such persons to whom the rents and profits of the lands should belong, in case the same were settled, and the proviso was that if *Richard Kettleby*, the husband, died before a purchase was made leaving no issue, and *Anne* his intended wife should survive him, that then the 2,000*l.* should be laid out in the purchase of land, to be settled upon *Anne* for life, remainder to the right heirs of *Richard*, or else three parts thereof should be paid to *Anne*, her executors, &c. at her election, to be made within six months after the death of *Richard*. Then the marriage took effect. R. L.

KETTLEBY v. ATWOOD.

The bill was brought by the plaintiff to have the 2,000*l.* invested in lands, and settled according to the articles.

Lord Keeper.—Had a bill been brought in the life-time of the infant (it being better and safer for the infant to have had land than money) I would have decreed the money to be laid out for the benefit of the infant: but I do not see, what equity the heir has against the administratrix. (1) The bill was dismissed, but without costs. (2)

Note—This cause was reheard *Mich. Term*, 1687, by the *Lord Chancellor Jefferies*, who decreed for the heir. *Vid. post Case* 458.

(1) As between the heir and personal representative their rights are purely legal rights, per Lord *Loughborough*, Chan. *Walker* v. *Denne*, 2 Ves. jun. 176. [Contra, *Biddulph* v. *Biddulph*, 12 Ves. 161. and see the Cases cited at the end of the next Note.]

(2) The decree as stated in the Register's Book is, "Whereupon, &c. his "Lordship did declare that the 2,000*l.* "did belong to the administratrix of "*Richard Kettleby*, and ought not to "be settled upon his heir," and dismissed the bill, but without costs. Reg. Lib. 1684. A. fol. 242. So *Lechmere* v. *Lady Lechmere*, Forr. 80. 3 P. Wms. 211. S.C. *Lancey* v. *Fairchild*, post 2 vol. 101, decreed on the authority of the principal case. Et vide *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171, where the doctrine and cases on this head are fully stated and considered; *Annand* v. *Honeywood*, post 345; also *Wheldale* v. *Partridge*, 5 Ves. 388. 8 Ves. 227. S.C. where decided that in order to convert real or personal property as between the heir and personal representative, the character of land or money must be imperatively and definitively affixed to it. [See also *Biddulph* v. *Biddulph*, 12 Ves. 161. *Stead* v. *Newdigate*, 2 Mer. 521, and Cases there cited. *Tregonwell* v. *Sydenham*, 3 Dow, 207.]

DOMINICK *versus* LANGLEY.

Case 294.
Eodem die.
In Court.
Lord Keeper.

THE case arose upon a marriage settlement, wherein there was a proviso, that in case the husband should have no issue male of the marriage, but should leave issue female, then the heirs of his body, or he that should have the estate by virtue of the limitations in the settlement, should pay to such issue female 1,000*l.* at eighteen years of age or marriage, which should first happen.

The husband died, leaving issue male and issue female by his wife, and the issue male died before the portion to the issue female became payable. Mr. *Solicitor.* The intent of this settlement is, that in case the husband died, and there should be no issue male of the marriage living when the portion became payable, then the 1,000*l.* were to be paid. *Sed non allocatur per Cur'.* And the bill was dismissed.

HIS Majesty King Charles *the* Second *being seized with a violent distemper, like an apoplectic fit, on* Monday, *being* Candlemas Day, *about* seven *of the clock in the morning, and Doctor* King *being accidentally there, immediately let him blood; but his Majesty continued many hours in his fit before he recovered his senses, and afterwards lay languishing of his distemper with a kind of an intermitting fever until the* Friday *following, when he died between the hours of* eleven *and* twelve; *all the courts at* Westminster *meeting and sitting about an hour that day; and about* three *o'clock in the afternoon of the same day, King* James *the* Second *was proclaimed, and the Judges, Attorney and Solicitor General having new commissions, were sworn on* Monday *following at the* Lord Keeper's *house, and sat at* Westminster *the same day, and on* Tuesday *the* Lord Keeper *and the* Master *of the* Rolls *sat in court, the* Master *of the* Rolls *administering the oath to the* Lord Keeper.

ANONIMOUS.

Case 295.

Eq.Ca.Ab. 351, pl. 9.

UPON a motion for a Serjeant at Arms on a commission of rebellion retorned:

Per Cur'. By the king's demise all process of contempt not executed is determined, so that you must begin again at an attachment; but where any process is executed, and a *cepi corpus* returned, there the process stands good. (1)

(1) Vide as to *cepi corpus*, *Frederick* v. *David*, post 344. So an attachment sued out before demise of the King, and executed three days after the demise held good, though without notice, *Burch* v. *Maypowder*, post p. 400. Et vide stat. 1 Ann. st. 1. cap. 8. sect. 5. [by which it is enacted that no process of courts of equity shall be discontinued by the demise of the Crown.] *Thompson's* case, 3 P. Wms. 195.

ANONIMOUS.

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Case 296.

Prohibition lies not to an inferior court, after the defendant has pleaded there; for by pleading the defendant submits to the jurisdiction.

ON a motion for a *supersedeas* to a prohibition to an inferior court, for that the prohibition was prayed at the suit of the party after he had pleaded to issue, and by that submitted to the jurisdiction of the inferior court:

But at the suit of the king, prohibition lies, though the defendant has pleaded. But if a prohibition has been granted the court will grant a *supersedeas*, if there is an affidavit that the cause arose within the jurisdiction.

Lord Keeper. *That* is a good reason why a prohibition should not go at the suit of the party; but where an inferior court meddles with matters out of its jurisdiction, I will grant a prohibition for the king in such a case: but if you bring an affidavit that the cause of action arose within the jurisdiction, upon that I will award a *supersedeas*. (1)

(1) Vide *Newhouse* v. *Milbank*, ante 276. *Day* v. *Pitts*, 1 Vent. 10. But a plea of non-jurisdiction on oath before imparlance taken (which admits jurisdiction) must be tendered in the inferior court, and then on refusal prohibition granted, *St. Aubin* v. *Cox*, 1 Vent. 181.

Case 297.

18 *Februar.*

Eq.Ca.Ab. 358, pl. 2. S. P.

Where lands are to be sold for payment of particular debts, the purchaser must take care to see his purchase-money rightly applied. (1) But if more is sold than is sufficient to pay the debts, that shall not turn to the prejudice of a purchaser.

SPALDING *versus* SHALMER & St. AMOND & *Al'*.

THE case was, that *Augustine Spalding*, the plaintiff's father, did in *April*, 1666, convey several manors and lands lying in *Hutton*, *Blagdon*, *Congresbury*, and *Kingston Seymour*, in the county of *Somerset*, to *Alexander Dyer*, *Thomas White*, deceased, and the defendant *Shalmer*, and their heirs, to the use of them and their heirs until they had raised by sales or profits sufficient to pay the debts in a schedule to the deed of trust annexed, amounting to 1,061*l.* and also to pay 1,500*l.* to one *Codrington*, in case he should convey an estate in *Hutton* according to articles made betwixt him and *Spalding*, dated 21st *March*, 1653; and after payment of the debts, and the 1,500*l.* and all charges relating to the said trust, the trustees were to stand seized of the remainder of the lands unsold, to the use of the plaintiff, the son of the

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said *Spalding*, in tail male, with remainder to the right heirs of the said *Augustine Spalding*.

The trustees enter and undertake the trust, and in 1668 sell unto *Robert* and *Richard Viccaris* the lands at *Congresbury* for 1,500*l.* and sell other lands at *Hutton* to several other persons for 772*l.* more, and so raised by sales in all 2,275*l.* and after this the trustees, in 1670, convey the lands at *Kingston Seymour* to *Nixon* and *Newcourt*, which is mentioned to be in consideration of 840*l.* but no money was actually paid, and the conveyance to *Nixon* and *Newcourt* was only in trust for *Alexander Dyer:* and as touching the 1,500*l.* to be paid to *Codrington*, he could not make a good title, and so the purchase was broke off; and instead of paying the 1,500*l.* to him, there was a decree made in 1672, that *Codrington* should pay to the trustees 800*l.* being part of the purchase-money that *Spalding* had advanced in his lifetime; which 800*l.* was accordingly paid; so that now the trustees had received 3,275*l.* Whereas the schedule debts amounted but to 1,061*l.* and the receipts and payments were all indorsed on the deed of trust.

After this, *viz.* in 1679, *Dyer* the trustee owing 200*l.* by bond to the defendant *St. Amond*, *St. Amond* lends him 200*l.*

(1) And where lands are vested in trustees by Act of Parliament to be mortgaged for a particular purpose, it is incumbent on the mortgagee to see the money applied accordingly, *Cotterell & Al' v. Hampson & Al'*, post 2 vol. 5. 2 Ch. Ca. 115.

more, and thereupon the said *Alexander Dyer*, and *Nixon* and *Newcourt* his trustees, make a mortgage to the defendant, *St. Amond*, of the lands at *Kingston Seymour* for securing the 400*l.* and interest, and deliver to him the deed of trust, by which he had notice, that the trust was only for payment of the schedule debts, which amounted but to 1,061*l.* and the 1,500*l.* to *Codrington*, and had also notice by the indorsements, that the trustees had raised by sales before the conveyance to *Nixon* and *Newcourt* 2,275*l.* but it did not thereby appear whether *Codrington's* 1,500*l.* were to be paid or not.

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Upon the hearing this cause, the questions were, how far the trustees should be charged with this breach of trust, and whether *St. Amond's* mortgage, he coming in with notice of the trust, should stand good against the heir.

For the plaintiff it was insisted, that all the trustees were answerable to the plaintiff for the breach of trust, in regard the deed of trust was particular, that they should sell for payment of the debts in the schedule only; and when they had raised, by the sale made to *Robert* and *Richard Viccaris*, 1,500*l.* that was sufficient to pay the debts in the schedule, with an overplus; and all the subsequent sales, wherein they all joined, were breaches of trust. But as to that it was answered, by the defendant's counsel, that when the lands at *Hutton* were sold, and the lands at *Kingston Seymour* conveyed to *Nixon* and *Newcourt*, the contract with *Codrington* was not broke off; for the decree was subsequent to those sales, and it did not then appear but 1,500*l.* was necessary to be raised for the carrying on that purchase. Whereunto for the plaintiff it was replied, that *St. Amond's* mortgage was subsequent to the decree, and he ought to have enquired whether *Codrington* had conveyed the lands at *Hutton*; for by the deed of trust, the 1,500*l.* was not to be raised till he had conveyed.

Each trustee shall be charged for no more than he actually receives.

Otherwise, if the trustees join in receipts.

Lord Keeper. Each trustee shall be charged for no more than he actually received; but where they join in receipts, there they shall be all charged. (1) And as to *St. Amond's*

(1) Vide *Fellowes* v. *Mitchell* and *Owen*, post 2 vol. 504, 515. 1 P. Wms. 81, and cases cited and arranged by Mr. *Cox* in not. there. Note.—The defendant *Shalmer* in the principal case by his answer admitted that he had joined not only in the several sales made of the trust estate, but also in the conveyance of the lands at *Kingston Seymour* to *Nixon* and *Newcourt*, but he denied that any of the money arising by the sales came to his hands, but that

SPALDING v. SHALMER.

mortgage, that was held to be good. Where lands are to be sold for payment of particular debts, the purchaser must take care to see his money rightly applied, and if the debts be not paid, *that* is such a breach of trust as shall affect the purchaser; but if more be sold than is sufficient to pay the debts, that shall not turn to the prejudice of the purchaser; for he is not obliged to enter into the account; (1) and the trustees cannot sell just so much as is sufficient to pay the debts: and he observed the deed of trust was not only for the payment of debts in the schedule, but also to pay the trustees their costs and charges.

Post Case 473, *justa finem cont'.*

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It was then said for the plaintiff, that 200*l.* of the money on *St. Amond's* mortgage was not advanced upon account of the trust, but was a debt owing by *Dyer*, and therefore ought not to be charged on the trust estate. *Sed non allocatur.*

The Court also directed, that the moneys disbursed by the

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the same was received, paid, and disposed of by *Dyer* and *White*, and he said he did not remember on what trusts, or to what intents and purposes the conveyance to *Nixon* and *Newcourt* was made. R. L. And in addition to the cases referred to in Mr. *Cox's* note, the following on this subject have since occurred, *Balchen* v. *Scott*, 2 Ves. jun. 678, where executor proved, but never having acted, received a bill in payment, and immediately sent it to the acting executor, held not liable, as such receipt and transmission being no acting. So the merely taking probate and joining with the other executor in acts necessary to enable him to administer, *e. g.* in a receipt perhaps not actually necessary, will not necessarily bind him, *Hovey* v. *Blakeman*, 4 Ves. 596, 608. Secus, if the executor goes further, and concurs in the application of the money, or other acts of administration of the assets, ibid. As where one being executor and trustee, joined the other in the sale of stock, and the other received the money and absconded, the executor joining in the sale held liable, *Chambers* v. *Minchen*, 7 Ves. 186. Et vide *Bacon* v. *Bacon*, 5 Ves. 331. Fonbl. Tr. Eq. Book 2. ch. 7. sect. 5. Mr. *Sanders's* note to *Leigh* v. *Barry*, 3 Atk. 583. From these cases, and the cases referred to by them, it appears, 1st. That a distinction is allowed and taken between executors and trustees. 2d. Between the necessity and non-necessity of the acts in which they join, and on which distinction indeed the first is a good deal founded. 3d. As between executors acting and executors not acting. 4th. Between the acts that are general acts of administration of the testator's assets, and the acts that are merely necessary to enable that executor, who, according to the principles of the court is considered as the acting executor, to administer the assets duly; and 5th. The court in forming its decision on all the cases in every class, will have regard to the circumstances that attend each particular case. [See further *Harden* v. *Parsons*, 1 Eden, 147. *Westley* v. *Clarke*, ibid. 357. *Brice* v. *Stokes*, 11 Ves. 323. *Langford* v. *Gascoyne*, 11 Ves. 333. *Shipbrook* v. *Hinchinbrook*, 16 Ves. 477. *Joy* v. *Campbell*, 1 Sch. & L. 341. *Doyle* v. *Blake*, 2 Sch. & L. 231. *Underwood* v. *Stevens*, 1 Mer. 712. *Walker* v. *Symons*, 3 Swan. 63.]

(1) Unless there be a *lis pendens* between the heir and trustee, *Culpepper* v. *Aston*, 2 Ch. Ca. 116.

trustees for the maintenance of *August. Spalding's* children, though not within the trust, should be allowed. (1)

SPALDING v. SHALMER.

(1) It appears that there was an account stated and settled between the plaintiff and *Dyer*, on the 10th April, 1682. And though the plaintiff by his answer to the cross-bill of the defendant *Shalmer* charging that fact, stated, that at the settling such account it was agreed between him and *Dyer* that if the balance due thereon was not well secured within a week from that time, and if in that space of time the like security was not given by *Dyer*, that he would convey to plaintiff and his heirs the lands in *Kingston Seymour*, and deliver to plaintiff all the writings relating to the trust estate, that the said account should be of none effect, and that none of those matters were performed by the said *Alexander Dyer*, yet the account was decreed to stand, but the defendant *Lovell*, the executor of *Dyer* was ordered, after having all proper allowances, to apply the residue of *Dyer's* estate in payment of what should be found due to plaintiff from *Dyer* on the said account; but the same was to be without prejudice to any equity the other creditors of *Dyer* might have against plaintiff, or any other person to whom the estate of *Dyer* should go, by virtue of that decree for satisfaction of any debts due to them from *Dyer* at the time of his death, and who had a bill depending against *Lovell* and others for that purpose. Reg. Lib. 1684. B. fol. 377. Entered *Spalding* v. *Lovell*.

MASSENBURGH *versus* ASH.

Case 298.

24 *Februar.*

Ante Case 230.

2 Ch. Rep. 275.

THIS cause upon the former hearing having been directed to be tried in a feigned issue in the *Common Pleas*, that so the validity of the contingent limitation over of the trust of the term to the plaintiff might come in issue, *Lord Keeper* declaring that the trust of a term in equity ought to be governed by the same rule as an executory devise of a term at law: afterwards upon a motion it was ordered, that a case should be drawn up for the *Judges* of the *Common Pleas* to give their opinion upon: and the *Judges* having unanimously given their opinion, that the contingent limitation over to the plaintiff was good, for this reason; because the contingent limitation was circumscribed, and must happen within the space of 21 years: the cause came now to be heard upon the equity reserved, and the *Lord Keeper* declared himself fully satisfied with the opinion of the *Judges*, and decreed for the plaintiff; and said, he took this case to be the same with the case of *Wood* and *Saunders*,(1)

(1) 1 Ch. Ca. 131. 2 Ch. Rep. 239. Pol. 35.

MASSENBURGH *v.* ASH.

Trust of a term limited to the husband for life, remainder to his first son; and if that son die leaving issue, then to such issue; but if the son die in the life-time of the father without issue, then to the second son. This remainder is good.

where the trust of a term was limited to the husband for life, remainder to the wife for life, (1) with a remainder to their eldest son; and if he died leaving issue, then to that issue; but in case he should happen to *die in the life-time of the husband or wife without issue, then the remainder over was limited to another son of the husband and wife; and this remainder by the advice of the *Judges* was held to be good. (2)

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(1) The limitation was to the husband for 60 years, if he should so long live; remainder to the wife for 60 years, if she so long lived.

(2) The remainder to the eldest son being but a contingency. *Reg. Lib.* 1684. B. fol. 250.

Case 299.

STAPLETON *versus* SHERRARD.

24 *Februar.*

Ante 212. Eq. Ca. Ab. 76, pl. 8. 161, pl. 3. S. C.

The custom of the province of *York* does not extend to the testamentary part of the personal estate, so that if an inhabitant within the province dies intestate, leaving a wife and no child, the wife shall have a moiety by the custom, and a moiety of the other moiety by the statute of Distributions. *Vid. post Case* 311, 407, 446.

THE question in this case was upon the custom of the province of *York*, the husband dying intestate without issue in the life-time of the wife, whether the wife should have any benefit of the other moiety, as administratrix, by virtue of the statute of *Distributions;* and the case of *Crisp* and *Hayes* in the *King's Bench* was cited, wherein it was said to have been adjudged, that the legatory part was out of the custom, and was to be governed by the statute of *Distributions*. But for the plaintiff it was said, that in the case of *Ramsden* and *Gudgeon* (1) in this court, it was adjudged otherwise; and that by the custom of the province of *York*, where the husband dies without issue, the children's part ought to go over to the next of kin; but that was denied by the counsel for the defendant, who said the custom of the province of *York* was the same with the custom of the city of *London*, unless in the case where the eldest son has lands by descent, he shall have no part of the personal estate.

As to the matter in question the *Lord Keeper* would de-

(1) *Goodwin* v. *Ramsden*, ante 200. post 2 vol. 274.

liver no opinion, but ordered, that the Lord Archbishop of *York* should be attended, and desired to certify how the custom of the province of *York* was in that particular. (1)

STAPLETON v. SHERRARD.

(1) Reg. Lib. 1684. B. fol. 256. Vide Show. Parl. Ca. 109.

EAST INDIA COMPANY *versus* EVANS & Al'.

Case 300.
25 *Februar.*

Bill by *East India* Company against a separate trader.

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THE bill was brought by the company, setting forth their letters-patent, and the great charges they were at in making leagues with Princes, and building forts, and maintaining forces in *India*, and prayed a discovery what the defendants had traded for there, and that they might be compelled to bear a proportionable part of the said charges.

To which bill the defendants pleaded, answered, and demurred. They pleaded they were free merchants, and set forth the statute 21 *Jac.* against restraining of trade, and the statute 9 *Edwardi tertii*, that all merchants might trade any where, and the statute 18 *Edw.* 3. that merchants might trade any where not in enmity with the King; and averred the *Indians* were not in enmity: and demurred as to the discovery, because it was to subject them to a penalty; and also to that part of the bill that would enforce them to contribute to the Company's charge; because it appeared by the plaintiff's bill that they denied the defendants liberty to trade to *India*, or to have the advantage of the plaintiffs' privileges: and by answer the defendants denied they traded under the Company's colours, &c.

For the defendants it was insisted, that as to what the plaintiffs prayed a discovery of, it was to enable them to go on in an action which sounded only in *tort*, and therefore they ought not to have a discovery in equity; and the discovery would likewise subject the defendants to great penalties; for though the Company by their bill waived the forfeiture, yet they might dismiss their bill, and would not be bound by that offer; and besides, that offer could in no sort bind the *King*, who was intitled to one moiety of the forfeiture, and had already brought informations against the defendants.

For the plaintiffs it was insisted, that *Sandys*, one other of

EAST INDIA COMPANY v. EVANS & AL'.

the *interlopers*, was ordered to admit he had traded to the value of 1,000*l.* and the Company had already recovered against him, by which they had affirmed their right at law; and therefore ought to have a discovery against these defendants: and as to what was objected from the statute of King *James*, *that* related to home trade only, and not to foreign trade; (1) and as to the other statutes of *Edw.* 3., they would not reach this case; for here was no league of amity, but only a league of commerce; and the defendants have by their plea said, the *Indins* are not enemies; but do not say they are at amity. And as to the objection, that the actions brought by the Company sounded in *tort* only, it was a common case, that a man shall have a discovery in this court in order to enable him to bring an action of *trover*, and cited the *printers'* case in this court. And as to the clauses of forfeitures they were void in law, and it had been oftentimes adjudged that any restriction of trade under pain of forfeiture was absolutely void. And as to the informations brought against the defendants, they are not brought for the forfeitures, but for a contempt to the *King*, and the defendants' demurrer is improper, for we hope to have relief here, by a commission to examine our witnesses who live beyond sea, and to have our possession quieted.

Serjeant *Pemberton* for the defendants: there is no precedent in this court that a bill might be brought for a discovery to enable the plaintiff to bring an action that sounds in *tort* only; and supposing the plaintiffs' patent is a patent for regulation of trade only, yet it is but like a patent for a new invention. The case in *trover* is founded upon a right; and though the plaintiffs now say the clauses of forfeitures in their patent are void, yet I know that lately in Mr. *Boome's* case in the *Common-Pleas* they made use of those clauses in this patent, to justify a seizure of goods.

Clauses in a charter to restrain trade under a forfeiture, void. Bill of discovery lies in equity, though for matters sounding in *tort*.

Lord Keeper. Clauses to restrain trade under forfeitures have been adjudged void about twenty times; (2) so that matter is out of the case; and it is a mistake to say a man shall not have a discovery in this court for matters that sound in *tort*; and cited the case, where a man carried his

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(1) Stat. 21 Jac. 1. cap. 3.

(2) So a bond, promise or contract, which restrains from trading at all, though with consideration, is void, *Mitchell* v. *Reynolds*, 1 P. Wms. 181. where the doctrine on this head is fully stated and discussed.

mine under his neighbour's ground; and the case where a man run away with a casket of jewels, he was ordered to answer, and the injured party's oath allowed as evidence in *odium spoliatoris*: and it seemed to him a strange demurrer, to say they are not to contribute to the charge of the company, because they were wrong doers. And this was but a charter for regulating of trade, and there had been many patents for that purpose, soon after the making of the statute of 21 *Jac.* which had never been thought illegal, nor complained of in any subsequent Parliament. And therefore his *Lordship* over-ruled the plea and demurrer, and ordered the defendants to answer the bill. (1)

EAST INDIA COMPANY *v.* EVANS & AL'.

Clause in a charter to regulate trade, good.

(1) Vide *East India Company* v. *Sandys*, ante 127.

OXBURGH *versus* FINCHAM.

Case 301.

25 *Februar.*

Eq. Ca. Ab. 3, pl. 8. S. C.

DEMURRER to a bill of revivor, because the plaintiff had not revived against all the defendants. *Per Cur'*. It is not necessary to revive against a defendant, that has not answered. (1)

In case of abatement it is not necessary to revive against a defendant that has not answered.

(1) In this case there appears to have been a cross-bill, a demurrer to which was over-ruled, and therefore no costs. Reg. Lib. 1684. B. fol. 235. Vide *Gealer* v. *Heath*, in Can. Hil. 12 Geo. II. So a suit may be revived as to part, Mitf. Tr. p. 74.

PAWLET *versus* INGRES.

Case 302.

Eodem die.

Eq. Ca. Ab. 79, pl. 2. 103, pl. 1. S. C.

ONE commoner had brought an action on the case against another commoner, for oppressing the common, and had recovered 10*l.* damages. The bill was brought by the defendant at law to examine his witnesses to prove his right of common in *perpetuam rei memoriam*.

A bill to examine witnesses in *perpetuam rei memoriam* is not proper until the party has established his right at law. *Vid. post Case* 308.

PAWLET v. INGRES.

Per Cur'. Such a bill is not to be admitted in this court. A commoner ought not to come here, to prove his right of common, until he has recovered at law in affirmance of his right: (1) but if the bill had been, that one commoner had recovered 1*s.* or other * small sum for damages against the plaintiff for oppressing the common, or for using the common where he ought not, and therefore that the other commoner might accept of like damages for what was past, to prevent charges at law; *that* had been in the nature of a bill of peace, and had been a proper bill in this court. (2)

If one commoner brings an action against *A. B.* for oppressing the common, or for using the common where he ought not, and recovers 1*s.* or other small sum for damages, and afterwards another commoner brings the like action against *A. B.* he may bring a bill in equity, that the plaintiff in such action may accept the like damages.

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(1) *Anon.* Gilb. Eq. Rep. 183. So wherever a matter is properly triable at law, as a title, *Gell* v. *Hayward*, post 312. *Bechinall* v. *Arnold*, post 354. *Wynn* v. *Hatty*, Pre. Chan. 531. *Parry* v. *Rogers*, post 441. *Phillips* v. *Carew*, 1 P. Wms. 117. *Brandling* v. *Ord*, 1 Atk. 571. So where the right by which the plaintiff claims, is not distinctly shewn, *Cressett* and *Others* v. *Mytton*, 3 Bro. Ch. Rep. 481. But allowed where affidavit made that witnesses were infirm and unable to travel, *Phillips* v. *Carew*, ub. sup. And that no other person than the witness was privy to the matter, *Shirley* v. *Earl Ferrars*, 3 P. Wms. 77. So where party in possession is only threatened with disturbance, and not actually disturbed, *Wynn* v. *Hatty*, ub. sup. Et vide *Lord Dursley* v. *Fitzhardinge*, 6 Ves. 251, where the distinction between bills to perpetuate testimony, and to examime *de bene esse*, is taken, and the cases on each head referred to.

(2) *How* v. *Tenants of Bromsgrove*, ante 22. *Ewelme Hospital* v. *Andover*, ante 266. Reg. Lib. 1684. B. fol. 264, by which it appears this was on a plea, and also on a demurrer for want of parties, which were allowed.

Case 303.

NORTON *versus* SPRIG.

27 Februar.

Eq. Ca. Ab. 60, pl. 4. S. C.

UPON arguing exceptions to the Master's report the question was, how far the second husband should be charged of his own estate, for a *devastavit* and breach of trust, committed by the feme, and her first husband.

How far the second husband is liable to a *devastavit* or breach of trust of the wife and her first husband.

Per Cur'. Where there is a bond there is a *lien* by deed, and so the second husband bound; but where there is barely a breach of trust or debt by simple contract, there in equity

the plaintiff ought to follow the estate of the wife, in the hands of the executor of the first husband. (1)

NORTON v. SPRIG.

(1) Vide *Gilpin* v. *Smith*, 1 Ch. Ca. 80. *Powell* v. *Bell*, Pre. Ch. 256. *Paget* v. *Hoskins*, ibid. 431. *Child*, post 2 vol. 61. *Crouch*, ibid. 118. *Baker* v. 1 Sch. & L. 262.] [*Adair* v. *Shaw*, *Sanderson* v.

GRICE *versus* BANKE.

Case 304.

Eodem die.

THE court of judicature for rebuilding houses burnt down by the great fire in *London*, having settled the rent, which the tenant was to pay for the house in question, *viz.* 5*l. per ann.* and there being an ancient rent of 1*l.* 5*s. per ann.* issuing out of the same house to a charitable use, and which was now 20 years in arrear, the question was whether the landlord or tenant should pay this rent.

Upon reading the act of parliament, the *Lord Keeper* was satisfied the tenant was in no case to be charged with more than the rent of 5*l. per ann.* in the whole; and directed the plaintiff to bring the Lady *Dorset*, who had the reversion [310] expectant on the lease, before the court; and ordered the tenant not to pay any more of his rent in the mean time, and declared that the growing payments and the arrears of the 1*l.* 4*s.* a-year ought to be deducted out of the rent.

PRETTYMAN *versus* PRETTYMAN.

Case 305.

28 Februar.

A FORMER decree of dismission being pleaded in bar, it was objected, that the dismission and decree could not be pleaded in bar, because the decree was not signed and enrolled; and if the defendant would have it that it was a suit still in being, then the plea was a plea in abatement only. (1)

Eq.Ca.Ab. 162, pl. 3. S. C.

A decree of dismission may be pleaded in bar to a new bill, though it is not signed and enrolled.

Per Cur'. Either that suit was for the same matter as the present, or not; if not, you ought to have moved to have had

(1) Vide *Bacon's* Law Tracts, p. 282.

PRETTYMAN v. PRETTYMAN. the plea referred; but if it is, then that suit is either depending or determined, and either way is pleadable. (1)

(1) The plea was of a suit and dismission in the Exchequer for the same matters, and allowed with 5 marks costs; and the order runs "That after payment of the costs it should be referred to the Master to examine and certify whether the plaintiff's bill, which was dismissed in the Exchequer, and his bill in this court be for one and the same matter in substance or not." Reg. Lib. 1684. B. fol. 282. Sed vide contra *Kinsey* v. *Kinsey*, 2 Vez. 577. *Anon.* 3 Atk. 809. So a decree and dismission in the court of exchequer (as in the principal case) over-ruled by the advice of the Judges, and the defendant ordered to answer, 1 Pr. Alm. 22, cited Wyatt's Prac. Reg. 328. But though such decree cannot be pleaded directly in bar, it may be to shew that the bill was exhibited contrary to the usual course of the court. And it may be insisted upon by way of answer, with liberty to except, *Kinsey* v. *Kinsey*, ub. sup. Mitf. Tr. 194, 5. As to plea of suit depending, *Urlin* v. *Hudson*, post 332.

Case 306. *Eodem die.*

NICHOLSON *versus* PATTISON.

Demurrer for not making oath of the loss of a deed whereof a discovery is sought by the bill.

THE bill suggested the defendant had got into his custody a writing purporting an agreement betwixt the plaintiff and defendant, and prayed he might set it forth; and suggested further that the plaintiff had paid the defendant the money due, and yet he threatened to take out execution.

As to the first part of the bill the defendant demurred; because the plaintiff had not made oath of the loss of the writing; and by his counsel it was insisted, that the plaintiff himself had this writing, but had razed it since the executing of it, and so by his own act has destroyed his own remedy at law, and therefore ought not to be aided in equity. *Sed non allocatur per Cur'.* (1)

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(1) *Anon.* ante 59. *Anon.* ante 181. *Godfrey* v. *Turner*, ante 247.

Case 307. *Eodem die.*

NAYLOR *versus* CORNISH & Al', Civit. Lond.

While the judgment against the charter of *London* was in force, a bill brought for a debt due from the chamber of *London* against the old Lord Mayor and Aldermen and the Commissioners.

THE bill was to be relieved touching a debt due from the chamber of *London*, under the common seal of the city, and was brought against the old mayor and aldermen, and the now commissioners; and the bill charges, that though the

NAYLOR v. CORNISH.

king had obtained judgment against the city in a *quo warranto*, yet he had been graciously pleased to declare, that he would take no advantage of the forfeiture of their lands; but had granted the lands to the defendants as commissioners to receive the profits in trust to pay the city debts, and that there was a chamberlain appointed (named in the bill) and the plaintiff had likewise made Mr. *Attorney General* a party, charging that he did not oppose the payment of the plaintiff's debt. (1)

The defendants demurred, for that they were not liable in their private capacities, nor did they receive any of the rents or profits of the city lands as citizens of *London*, nor upon trust to pay the debts of the city.

For the defendants it was insisted, they acted by commission, and were only in nature of managers, and accountable to the king only, and acted only during his pleasure.

The *Lord Keeper* ordered the defendants to answer, but said the plaintiff had but a melancholy reckoning, there being a debt of above 150,000*l.* due to the orphans, which was to be preferred in payment. (2)

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(1) The clear effects amongst others of the dissolution of a corporation are, that its lands revert to the donor, and that the members can neither recover debts which are due to the corporation, nor be charged with debts contracted by it in their natural capacities, Co. Litt. 13 b. *Edmunds* v. *Brown* & *Al*, 1 Lev. 237. Et vide *Croft* v. *Howell*, Plowden 538. Sed vide as to *quo warrantos* against corporations. 3 Bl. Comm. 263, 4.

(2) The demurrer was over-ruled without costs, the bill charged that the money had been lent by plaintiff to supply the necessities of the Chamber of London, to pay to orphans. Reg. Lib. 1684. B. fol. 256. Entered *Naylor* v. *Smith*.

GELL *versus* HAYWARD.

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Case 308.

Eodem die.

Upon a bill to perpetuate the testimony of witnesses touching a right to a way, the plaintiff must set out the way exactly in his bill *per et trans*, as he ought to do in a declaration at law.

BILL to examine witnesses to perpetuate the testimony of witnesses touching a right to a way. The defendant demurred; because the plaintiffs had not set forth by their bill the way they claimed with sufficient certainty.

Lord Keeper. If you have not laid the way in your bill exactly *per et trans*, as you ought to do in a declaration at law, I will allow the demurrer, for uncertainty. But upon reading the bill it appeared to be laid certain enough.

GELL v. HAYWARD.

But such a bill ought not to be brought for such trivial things as right of common, or for ways or water-courses; or at least not till after a recovery at law. *Vid. ante Case* 302.

Then the *Lord Keeper* said, he would not allow examination in *perpetuam rei memoriam* for such trivial things as right of common, or for ways, or water-courses; or at least not till after a recovery at law; for that the examination costs more than the value of the thing: and in the present case the plaintiff is either disturbed in his way, or he is not; and if he be, he has his remedy at law; and if he be not he has no reason to complain: but for the plaintiff it was said, that the bill charged the plaintiff's tenant was in combination with the defendant, and would not suffer the plaintiff to bring an action in his name. (1)

(1) It appears that the bill in this case charged, that the defendant and several of the plaintiff's tenants, holding land to which the way led combined together, so that the plaintiff could not try his right at law, and yet that the plaintiff had not served the said tenants with process. The order was in the following words, "Inasmuch "as the defendant (qu. plaintiff) hath "brought no action at law, and the "tenants had not answered, the court "doth order that the plaintiff do pro- "secute the other defendants the te- "nants to answer, and after they have "answered, and that the plaintiff shall "have brought his action, the said "plaintiff might then procure the said "demurrer to be set down, to be fur- "ther heard as he shall be advised." Reg. Lib. 1684. A. fol. 340. Vide *Pawlet* v. *Ingres*, ante 308.

Case 309.

Eodem die.

NORRIS *versus* BACON.

Solicitor brings a bill for his fees. Plea of Stat. 3 *Jac.* that the plaintiff had not signed his bill. Good plea.

A SOLICITOR brought a bill in this court for his fees. (1) The defendant pleaded the statute 3 *Jac. ch.* 7., that the plaintiff had not signed his bill, and the plea was allowed. (2)

(1) *Note.* This act extends only to attorneys of the courts at *Westminster*, and not to practisers in inferior courts. Neither is it pleadable at common law to a special promise or to an *insimul computasset*. *Berkenhead* v. *Fanshaw*, 1 Salk. 86.

(2) The words of the order are as follow: "His Lordship doth order "that the said defendant's plea be "over-ruled without costs, but the "plaintiff is to subscribe his name to "his bill of charges annexed to his "bill in this court." Reg. Lib. 1684. B. fol. 288. Vide stat. 2d Geo. II. cap. 23. sect. 23. As to a bill for fees, vide *Lord Ranelagh* v. *Thornehill*, ante 203, and cases cited in not. there.

DE

TERMINO PASCHÆ,

1 *Jacobi II.* 1685.

IN CURIA CANCELLARIÆ.

GRANT *versus* STONE. Case 310.

An action at law will lie upon a recognizance; but if it is entered into in pursuance of an order of this court, the court will not allow it to be sued otherwise than by a *scire fac.* in this court.

It was moved on behalf of the plaintiff, that he having entered into a recognizance by order of the court, that the defendant endeavoured to arrest him upon it at law; whereas by the course of the court he ought to bring a *scire fac.* only.

For the defendant it was said, that a recognizance is suable, as well at law, as in this court; and the defendant had chose to bring an action upon the recognizance, to the intent he might hold the plaintiff to bail.

Lord Keeper. A recognizance is suable in the courts at law, either by an action to be brought on it, or more properly by an original in the *Common Pleas;* but this being a recognizance entered into by order of this court, I will not allow it to be sued otherwise than by a *scire fac.* in this court. (1)

(1) Reg. Lib. 1684. A. fol. 358. v. *Perton*, ibid. 817. *Gomerset* v. *Aske*, Vide *Anon.* Dy. 369 b. *Cowper* v. Yelv. 133. *Langworth*, Cro. Eliz. 608. *Preston*

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STAPLETON *versus* SHERRARD. Case 311.

7 Mai.

Ante Case 299.

This cause came before the court, upon exceptions taken to the certificate of the Lord Archbishop of *York*, to whom, upon the hearing of the cause, the *Lord Keeper* had referred it, to certify how the personal estate of an inhabitant of the

STAPLETON v. SHERRARD.

province of *York*, who dies without issue intestate, leaving a widow, ought by the custom of the province of *York* to be distributed. The certificate was, that after debts and funerals paid, one moiety of the personal estate belonged to the widow, and that the other moiety had been usually distributed amongst the next of kin. (1)

Ante Case 195.

For the defendant, the widow of the intestate, it was argued, that the custom of the province of *York*, where a man dies without issue intestate leaving a widow, extends only to one moiety of the personal estate, which the wife is to take by the custom; and the other moiety is clearly out of the custom, and left to go in a course of administration, and is to be governed by the statute for the distribution of intestates' estates; and the widow the administratrix will be entitled to have her share of the other moiety, according to the statute: and it is unreasonable to believe, that there is any such custom as is pretended, for the custom does *privare communem legem*. As to so much of the personal estate as the custom reaches, *that* is bound by it, and no devise of the party can prevent it. And if the custom is, as it is here certified, it will follow, that where a man has children, there he may by will dispose of one-third part of his personal estate, but when he has none, he cannot devise one penny; for by the custom one moiety is to go to the wife, and the other moiety to the next of kin: so that the whole is bound: and if this be so, the custom has a greater respect to remote relations, than it has to a man's own children; for the children can claim but a third part by the custom, but the next of kin shall have a moiety.

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For the plaintiff it was said, that an inhabitant of the province of *York* may dispose of his estate as he will, in his life-time; and that this custom is only, where a man dies intestate; and therefore it cannot be said to be unreasonable, that when a man is surprized, and has not time to make a will, that one moiety of his estate should be distributed

(1) The exceptions to the certificate appear in effect to be, "That his Grace "had certified more than was referred "to or desired of him by this court, "which tends to the defendant's damage, for that he hath certified not "only the custom which was all that "was desired of him, but likewise the "practice of the ecclesiastical courts at "*York*, concerning the distribution of "the residue of intestate's estates, "which, notwithstanding ought to be "distributed according to the act for "Distribution of Intestates' Effects, and "not otherwise, whereby it is expressly "provided that the custom of the province of *York* might be observed as "formerly." R. L.

amongst the next of kin; and cited *Crispe's* case in *B. R.* that where a citizen of *London* dies intestate, his whole estate, as well the legatory part as the residue, is governed by the custom, and that no part of it is touched by the statute of Distributions of Intestates' Estates. (1)

STAPLETON v. SHERRARD.

Lord Keeper. I take it that the whole is governed by the custom; and the usage of the spiritual court, (which is here certified by the archbishop) is great evidence of such a custom; and I do not believe that the act for Distribution of Intestates' Estates, intended that the wife should have more than a moiety: and he said he took it, that the statute of *Hen.* 8. leaves the ordinary at liberty, to grant administration either to the wife, or next of kin: but it was said by Mr. *Solicitor*, that the courts at law would prohibit the spiritual court from granting administration to the next of kin, where there was a wife; and cited the cases of *Thompson* and *Butler*, and *Sir *George Sands's* case in *B. R.* where prohibitions were granted in such cases: but the *Lord Keeper* was of opinion, that if such prohibitions had been granted, it was against the act of parliament, which expressly leaves it to the ordinary's discretion to grant administration either to the wife or the next of kin. (2)

* 1 Sid. 179.

(1) *Whethill* v. *Phelps*, Pre. Ch. 328. *Percivall* v. *Crispe*, 2 Show. 175.

(2) The exceptions to the Archbishop's certificate were over-ruled, but without costs, if the defendant should divide the intestate's property according to the certificate, and pay the same to the persons intitled within two months from the date of the order. Reg. Lib. 1684. B. fol. 375. *Note*,—in this case *Lord Keeper* said, "I cannot expound "the act to give defendant more than a "moiety, that being the proportion "allotted to her by the custom, and "also by the act, if it had not been a "case within the custom; which cus- "tom is confirmed, because it appoints "the same kind of distribution with "the act, and it would be a strain to "give her more than a moiety, part "by the custom, and part by the act." This cause appears by the Register's Book to have obtained a re-hearing before Lord Chancellor *Jeffereys*, Trin. Term, 1687, when *Lord Keeper's* decree was affirmed, Reg. Lib. 1686. B. fol. 610. *Sands's* case, Sir T. Raym. 93. *Carter* v. *Crawley*, ibid. 498. Et vide ante p. 212. post p. 432, 465, S. C.

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BONITHON *versus* HOCKMORE.

Case 312.

8 *Mich.*

Eq. Ca. Ab. 7, pl. 1. 328, pl. 4. S. P.

IN an account before the Master, the plaintiff, who had married the defendant's mother, and had a debt upon the estate,

Mortgagee or trustee manages the estate himself, he is not to be allowed for his own care and pains. Otherwise if he employs a bailiff.

TUNSTALL v. OXENBRIDGE.

you ought to have set forth the assignment, and grounded your bill upon it, which you have not done; so that your bill is defective in that point; and besides, the last life died so long since as in 1649, and the defendant hath renewed the lease twice since that time. *Adjournatur*. (1)

(1) The bill was dismissed. Reg. Lib. 1684. B. fol. 368. Entered in the name of *Tunstall* v. *Piggott*, and the decree affirmed in the *House of Lords*, 22d *March*, 1693. Journ. Ho. Lord. 15 vol. 400.

Case 315.

Eodem die. In Court.

DURBAINE *versus* KNIGHT.

Eq. Ca. Ab. 126, pl. 7. S. C.

A FEME sole exhibits her bill, and pending the suit intermarries: the baron and feme bring a bill of revivor, and obtain a decree with costs.

Feme sole brings a bill, and pending the suit marries, and baron and feme bring bill of revivor, and obtain a decree with costs; they shall have costs for the whole suit, excepting only the bill of revivor.

The question was whether they should have costs of the whole suit, or only from the bill of revivor.

Lord Keeper. This is not like a revivor against an heir or executor, where the suit is abated by death; in that case they shall answer only for thir own time: but here all proceedings stand in *statu quo*, and it is unreasonable there should be such an abatement. And in case the defendant had been a feme sole, and intermarried, *that* should not have abated the plaintiff's suit; (1) and in this case the abatement was by the party's own act.

The Court ordered the costs of the whole suit, deducting only the charge of the bill of revivor; which was thought hard in these two respects; *first*, that the abatement was by the party's own act; *secondly*, that had the defendant been in the right, and so ought to have had costs, yet he could not have compelled the plaintiffs to revive. (2)

(1) But the husband ought to be named in the subsequent proceedings, *Wharam* v. *Broughton*, 1 Vez. 181. For the reason of the difference on this head between the cases of female plaintiff and defendant marrying, vide Mitf. Treat. p. 45. (3d ed.) et seq.

(2) Reg. Lib. 1684. A. fol. 564.

ANONIMOUS.

Case 316.

THAT a *subpœna* served, and bill filed, is a *lis pendens* against all persons; but the service of a * *subpœna*, without a bill's being actually filed, makes no *lis pendens*; but the bill being filed, the *lis pendens* comes from the service of the *subpœna*, though it be not returnable till the next term, and though the party lives never so remote; (1) for otherwise a man upon the service of a *subpœna* might alien his lands, and prevent the justice of this court: but that being by the counsel observed to be a hard fiction in equity to bind purchasers; it was proposed that some course might be taken, by having some public record or calendar kept, whereunto purchasers might have resort, and see what lands are in demand in this court, as they may at law in case of *fines*. *Cur' advisare vult.*

Whether a *subpœna* served and a bill filed is a *lis pendens* against all persons. Agreed it is not, if there is only a *subpœna* served, and no bill filed.

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(1) Vide *Preston* v. *Tubbin*, ante 286.

DUNCH *versus* KENT

Case 317.

11 *Mail.*

Ante Case 253.

THIS cause coming now before the court, upon the Master's special report, who had reported, that the assignments made by *Lindsey* to the defendants, purported to be in consideration of debts due and owing by *Colvile*, yet in truth they were not *Colvile's* debts, but *Lindsey's* debts.

Notice of letters patent in which there was a trust for creditors, is sufficient notice of the trust.

Per Cur'. Though the creditors of *Colvile* did not come in within the year, yet this patent was a trust for them and was special assets, and not convertible to other purposes by *Lindsey*, who married his executrix; but *Lindsey*, after the year, ought to have preferred his bill, to have compelled his creditors to have come in, or otherwise to renounce the trust; and *Lindsey* having not so done, but assigned to creditors of his own, that were not creditors of *Colvile; that* was a breach of trust, and void, as against *Colvile's* creditors. And though it was objected, that *Lindsey's* creditors had made over their assignments to other persons, who came in as purchasers without notice, for full and valuable considerations; yet *per Cur'* such purchasers came in under the letters patent, in which the trust is mentioned, and they ought to have taken notice of it at their peril.

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Case 318. ZOUCH *versus* SWAINE.

Eodem die.

A. draws in *B.* a young gentleman to sell his estate at a great under-value, with covenants from *B.* for *A.'s* quiet enjoyment. *A.* is evicted, and brings action on the covenants. *B.* relieved in equity upon re-payment only of the purchase-money and interest, and not left liable at law to answer the value of the land upon the covenant.

THE defendant had drawn in the plaintiff, a young man, and purchased an estate of him at a great under-value; and it happened, that the title was defective, and the defendant had been evicted; and there being covenants for quiet enjoyment, and other securities entered into by the plaintiff, he now came to be relieved against an action brought on these covenants: and for the defendant *Swaine* it was insisted, that he ought to have the value of the estate evicted.

Lord Keeper. The defendant, who was a lawyer, and ought to have understood a title, purchased this estate at a great under-value; (1) and the title now proving defective, and the land evicted, it is unreasonable he should make an advantage of this catching bargain; and therefore decreed him his purchase-money with interest only, discounting mesne profits. (2)

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(1) But under-value alone without fraud, will not, in all cases, be relieved in equity, *Wood* v. *Fenwicke*, Pre. Ch. 206. *Floyer* v. Sir *Brownlow Sherrard*, Amb. 18. *Willis* v. *Jernegan*, 2 Atk. 251. *Nichols* v. *Gould*, 2 Vez. 422. *Stephens* v. *Bateman*, 1 Bro. Ch. Rep. 21. *Speed* v. *Phillips*, Anst. 732. *Heathcot* v. *Paignon*, 2 Bro. Ch. Rep. 179., and cases cited in not. there. In what cases equity will relieve against unequal contracts without fraud, see *Osmond* v. *Fitzroy*, 3 P. Wms. 129. Et vide *Batty* v. *Lloyd*, ante 141. *Johnson* v. *Nott*, ante 271. *Herne & Al'* v. *Meeres*, post 465.

(2) Reg. Lib. 1684. B. fol. 403. The interest to be computed from the date of a deed which was considered as a settlement of the account. In this case it appears that the plaintiff's father had in his lifetime mortgaged the premises in question to one *Summers*, and then made his will, and appointed plaintiff's mother and others executors, and died leaving the plaintiff his heir at law, who filed this bill against the mortgagee for an account and redemption; this was decreed. The plaintiff and his mother then applied to *Wergg* and *Swaine* for a loan of the money to pay off the said mortgage, and they or one of them accordingly lent the same, and the premises were then conveyed in mortgage to *Wergg*, who entered and received the profits to an amount more than sufficient to pay the said mortgage money and interest. The plaintiff's mother then died, leaving plaintiff, who became entitled to the equity of redemption; and thereupon *Wergg*, by deed 16 Dec. 30 Car. II. re-conveyed the premises to him and the defendant, who then, or soon after, got the plaintiff, who was then just come of age, to execute an absolute conveyance of the premises to him, pretending that it was only a counter-part of the conveyance from *Wergg*, and then entered and received the profits, for an account of which, and to have a re-conveyance from *Wergg* and *Swaine*, the bill was filed; *Swaine* put in a plea to the plaintiff's title, and an answer, submitting to account on payment by plaintiff of what was due on the mortgage, and an account was so decreed, and as against *Swaine* and *Wergg*, of

all the rents and profits of the said estate, from the time of the conveyance to *Wergg* by the mortgagee of the plaintiff's father. Reg. Lib. 1680. B. fol. 555.

SEYMOUR *versus* FOTHERLY. Case 319.

In Court. Lord Keeper.

One has two sons, and on the marriage of his eldest articles to settle land on the eldest son and his wife for

THE father, on the marriage of his son with the plaintiff's daughter, in consideration of 4,000*l.* portion, which the father was to receive, articles to settle lands to the use of the son for life, remainder to the wife for a jointure, remainder to the first and other sons of the marriage in tail male, remainder to the right heirs of the son.

their lives, with remainder to the first, &c. son in tail male successively, remainder in fee to the son. Father brings a bill to be relieved against the articles, as gained by surprise, and that it was intended to limit the remainder to the second son, on failure of issue of the first. *Sed non allocatur.*

The bill was to discover the value of the estate, and what incumbrances might be upon it, and to have the articles performed. The defendant having another son, insisted, he was surprized in the articles, (1) and intended that in default of issue male of his eldest son, his estate should have [321] come to the second son, charged with portions for daughters, and would have had the court interpose, that the settlement might have been so made. *Sed non allocatur.* (2)

(1) Vide *Griffith* and *Buckle* v. *Buckle*, post 2 vol. 13. where marriage articles much of the same nature with these were varied, the father alleging surprise, and the son made but tenant for life.

(2) And decreed a specific execution of the articles. Reg. Lib. 1684. B. fol. 422. This court will admit parol evidence to prove mistake in deed or agreement, but not to vary, *Joynes* v. *Statham*, 3 Atk. 887. *Baker* v. *Paine*, 1 Vez. 457. And will not to add to a written agreement unless in cases where there is a clear subsequent and independent agreement, varying the former, *Rich* v. *Jackson*, 4 Br. Ch. Rep. 514. Et vide the *Marquis of Townshend* v. *Stangroom*, 6 Ves. 328., where the doctrine on this subject is very much considered, and the leading cases are fully stated, *Robson* v. *Collins*, 7 Ves. 133. *Woollam* v. *Hearn*, ibid. 211. Nor by the rule of law, independently of the statute of Frauds, will parol evidence be admitted to contradict a written agreement, ibid. 218. As to the practice of the court in regard to marriage articles in particular, vide *Beachinall* v. *Beachinall*, ante p. 246. and cases cited in not. there.

Case 320. LADY PAWLETT *versus* LORD PAWLETT *& Al'*.

13 *Maii.*
Ante Case 201.

JOHN LORD PAWLETT, by indentures of lease and release 7 and 8 *Maii*, 1679, conveys several manors and lands to trustees and their heirs, to the use of himself for life, without impeachment of waste, and after his death to other trustees for the term of 500 years, upon the trusts therein after declared, and then limits several remainders over. The trust of the term for 500 years was declared to be for raising moneys by rents and profits, or by leases, to be derived out of the term for 500 years, (1) in the first place to pay the Lord *Pawlett's* debts, as also such yearly maintenance for every younger son and daughter as was therein after expressed; and after payment of his debts, and such maintenance as aforesaid, then to pay all such sums for all and every younger son and daughter, as the said Lord *Pawlett* had or should have, and at such time and times and in such manner, as he should by writing or by his last will appoint; and in default of such appointment, the trustees should in convenient time after such debts as aforesaid should be satisfied, and not before, raise and levy out of the premises 4,000*l.* a-piece for each and every younger son, and 4,000*l.* a-piece for each and every daughter of the said Lord *Pawlett* on the Lady *Susanna* his second wife begotten, payable (2) at *one and twenty* or marriage, which should first happen; with this further, that in case the said Lord *Pawlett* should not otherwise direct by will, every younger son and daughter should be allowed such competent yearly maintenance and education, as should be thought
[322] requisite, till the portions should be respectively paid, so as such maintenance did not exceed 150*l. per ann.* for a son, and 100*l. per ann.* for a daughter; and after the performance of these trusts, (and some other trusts therein mentioned) the trustees were to surrender so much of the *five*

(1) The words of the trust are, "That the said trustees should, after "the commencement of the 500 years, "either out of the clear yearly rents "or profits, *or out of so much of the "premises*, or by the granting leases, "or any other lawful way allow to "the defendant Lord *Pawlett*, a "yearly maintenance, and should levy "so much more money as should be "sufficient for payment of his debts." R. L.

(2) "To be paid." R. L.

hundred years term as should remain, to whom the immediate reversion should belong.

The Lord *Pawlett* by his will the 29th *May*, (79) devises to his two daughters, by the said *Susanna* his wife, 4,000*l.* a-piece for their respective portions, to be raised and paid to them respectively in such manner, as in the said indenture is directed; and further wills that they should have the same yearly maintenance, until their respective portions should be raised, as by the said indenture was appointed. Provided that by virtue of his will, or of the said indenture or otherwise, all put together, his daughters should not have more than 4,000*l.* a-piece for their portions; unless his son and heir apparent should happen to die without issue, and then they should have 2,000*l.* a-piece more.

The Lord *Pawlett* dies, leaving issue by the Lady *Susanna* one son, *viz.* the defendant the Lord *Pawlett*, and two daughters, *Susanna* and *Vere*. Before any part of the portion of *Vere* could be raised, she (12th *December*, 1681), dies under age, and unmarried; and administration of her estate is granted to the plaintiff her mother, who brings her bill against the heir and the trustees, to have the said legacy of 4,000*l.* and interest for the same from the death of *Vere*, raised out of the trust estate.

This matter coming on this day to be argued upon a case stated specially by a master, the sole question was, whether, as this case is, the Lady *Susanna* is entitled to have the 4,000*l.* and interest raised out of the said estate.

For the plaintiff it was insisted, *first*, that the 4,000*l.* was [323] *debitum in presenti*, but payable *in futuro*, and therefore being an interest vested, it ought to go to the administratrix.

2ndly. That this 4,000*l.* is a duty arising by the will, and is in the nature of a legacy; for the deed was to take place only, in case the Lord *Pawlett* had made no appointment by his will; and in all cases of construction, equity ought to favour the right that goes in a course of administration: and though now the case falls out to be between the mother and the heir at law, which of them shall have the benefit of this 4,000*l.* and the plaintiff's counsel would draw an equity from thence in favour of the heir; whereas it might have so happened, that the son might have died in the lifetime of his sister, and then the controversy would have been between the mother and the half-sister; and there ought to be the same rule in both cases: and suppose this portion

PAWLETT v. PAWLETT.

had been made payable at twenty-one only, and the daughter had married and died under twenty-one, leaving children, it would be hard by a construction in equity to deprive the daughter's children of this 4,000*l.* and it was urged that the deed being penned, that after all portions paid, the Lord *Pawlett* should have the estate, it was not thereby meant that he should have it before all the portions were raised and paid.

For the defendant it was insisted, that the case depends upon the deed, and not upon the will, which only confirms the deed, and is a case purely in construction, and a matter of trust, and therefore equity ought to favour the heir in such a case; and the case of *Bond* and *Brown* was cited as a case in point, which was decreed last term by the *Lord Keeper* in favour of the heir; and what was principally relied upon was, that this was not a legacy, nor did arise by the will; for then it was admitted it must have gone in a course of administration; (1) but the duty arose upon the deed, and was given under the notion of a portion, and not

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as a legacy, and a maintenance is appointed in the mean time; and it was not intended that the daughter should dispose or have any interest in the 4,000*l.* till marriage, or twenty-one.

Lord Keeper. This is a case both great in value and in its consequence, and I find no precedent on either side; the case of *Bond* and *Brown* being a new case, and decreed but last term, is not to be urged as a precedent. As to a legacy devised by a will, I take the law to be settled, that where it is *debitum in præsenti*, though not payable till a future day, it shall go in a course of administration; and the reason is, that it takes place on the personal estate, and depends purely on a will, which is to be construed and expounded in the spiritual court; and in such case it is but just that the legacy should go in a course of administration, in regard it comes out of the personal estate; and it is indifferent whether the executor of the first or the last takes it: (2) and so

(1) Vide *Bond's* case, 2 Ch. Ca. 165.

(2) *Lord Latimer's* case, Dy. 59 b. *Clobberie's* case, 2 Vent. 341. *Smith* v. *Smith*, post 2 vol. 92. *Cruse* v. *Barley*, 3 P. Wms. 21, and cases cited in note there. *Stepleton* v. *Cheele*, post 2 vol. 673. Pre. Ch. 317. S. C. *Anon.* post 2 vol. 199. And in *Saunders* v. *Earle*, there cited, the distinction, as to the case of a vested interest is, if the legacy be to be paid with interest, it shall be paid presently, if not, it shall be expectant till infant would have attained 21. Et vide *Wilson* v. *Spencer*, 3 P. Wms. 172. *Duke of Chandos* v. *Talbot*, 2 P. Wms. 613, and the notes there.

it is where a sum of money is by will only devised payable out of land; because it has been looked on as a legacy; but where it stands upon a deed only, as I take it it does in this case, the will being only a confirmation of the deed (1) (and so it would have been if the Lord *Pawlett* by deed had only raised a trust for payment of such portions as he by will should appoint) the case is quite of another consideration: and here the plaintiff has no title at law, neither is there any demand according to the letter of the deed; but the plaintiff would have the trustees decreed to raise a portion, which according to the letter of the deed never became payable, and would have me force a construction in favour of the plaintiff the Lady *Pawlett*, in prejudice to the heir at law; but I see no reason to decree for the plaintiff; and the rather, for that the 4,000*l.* is to come wholly out of the lands, and the personal estate no way subjected or made liable to the payment of it by the will: and therefore the bill must be dismissed. (2)

Note.—This decree was affirmed upon an appeal to the House of *Lords*. (3)

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(1) And although there be a will in the case, yet it refers to the deed, and was made at the same time, so that it does not at all alter the consideration of the case, per *Lord Keeper*, R. L.

(2) And *Lord Keeper* said, "He "conceived there was a great differ- "ence between a legacy and a trust, "for that a trust is expounded accord- "ing to the intent of the party, but a "legacy is governed by the rules of "common law, and an executor, who is "to have the residue in one case, is not "of so great regard as the heir who is "to have the residue in the other." Reg. Lib. 1684. A. fol. 516. From the above cases it appears, 1st. That there is a clear distinction between a personal legacy and a portion or legacy out of land, the latter sinking, under circumstances, for the benefit of the heir, while the former would not for the executor. 2ndly, That certain words or directions in the former cases *e. g.* "payable," or "to be paid at 21," or "to be paid with interest," or "with interest," without the words "to be paid," are necessary to give the legatee a vested interest. 3dly, From the aforesaid case of *Saunders* v. *Earle*, at least if an interest be vested, yet that representative of legatee shall not take the principal, till legatee dying would have attained 21, if to be paid without interest. Otherwise, if to be paid with interest, there he should take it presently. And so is *Cloberry* v. *Lampen*, 2 Freem. Rep. 24.

(3) 19th Nov. 1685. Journ. Ho. Lords, 14 vol. 87.

Case 321.

PRESTON *versus* JERVIS.

19 *Mali.*
Lord Keeper.

THE case was, that the defendant's elder brother, in 1665, sold lands, of the nature of *Borough English*, to the plaintiff's mother, which belonged to the defendant; the elder brother apprehending then, as is pretended, that the defendant was dead. The plaintiff's mother took a bond from the elder brother, to indemnify her against the defendant's title; for the lands lying in *Kent* are presumed *primâ facie* to be *gavel-kind:* (1) and in truth, as it appeared, and was proved in the cause, the younger brother having notice that his elder brother had thus sold his lands, they came to an agreement, (2) by which the elder brother was to pay the defendant an annuity, which was equal to the annual value of the lands, (3) and so he suffered the plaintiff's mother to enjoy her purchase whilst the elder brother lived, but he being dead, the defendant brought an ejectment to evict the plaintiff, who claimed as heir to his mother, and thereupon brought his bill to be relieved.

Lands lying in *Kent* are *primâ facie* presumed to be *gavel-kind.*

And in regard the land was sold in 1665, and the younger brother, in 1674, came over into *England,* and, after he had notice of the sale, had accepted an annuity of his elder brother, and suffered the plaintiff's mother to enjoy, without calling her title in question, during all the lifetime of his elder brother; (whereas if he had so done, the plaintiff's mother might have taken advantage of her collateral security, which was now of no value, the elder brother having left no assets;) and it being also proved that the elder brother suffered some other lands to descend upon, and come to the defendant, which he might have prevented, it was decreed that the defendant should make good the plaintiff's title, and surrender and release the lands to the plaintiff and his heirs. (4)

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(1) *Wiseman* v. *Cotten,* 2 Danv. 441, pl. 2. 1 Lev. 79. Hard. 325. Sid. 17. 135, S. C. *Randall* v. *Jenkins,* 1 Mod. 96. *Willis* v. *Lucas,* 1 P. Wms. 475. Robinson on Gavel-kind.

(2) In 1676 or 1677. This agreement was denied by the answer, but proved. R. L.

(3) And to leave him lands of the elder brother in *Kent.*

(4) Reg. Lib. 1684. B. fol. 434.

Case 322.
20 *Maii.*
Lord Keeper.
Eq. Ca. Ab. 68, pl. 8. S. C.

KENGE *versus* DELAVALL.

A woman living from her husband, and having a separate maintenance, contracts debts; the creditors by a bill in this court may follow the separate maintenance whilst it continues; but when that is determined, and the husband dead, they cannot by a bill charge the jointure with those debts.

Sir *Ralph Delavall* and his lady, by reason of some discontents in the family, agreed to live apart, and there was a separate maintenance settled on the lady, but determinable on either of their deaths. The lady contracts several debts to the plaintiff and others during the separation. (1) Sir *Ralph* dies, and the bill is to subject the defendant's jointure to the payment of the plaintiff's debt.

Lord Keeper. Had the separate maintenance continued, there might be some reason for the creditors to follow that, and make it liable to their satisfaction; but that being determined by the death of the husband, I do not see which way the jointure can be charged with it; and the rather for that the executor of the husband, who may have paid the debt, is no party to the suit. I over-ruled the demurrer indeed, because I would have the case before me with all its circumstances, but now I see no equity, and therefore the bill must be dismissed. (2)

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(1) Vide *Ferrars* v. *Ferrars*, ante 71., and cases cited in note there.

(2) It was stated in the bill that the defendant had agreed to pay the debts out of her separate maintenance, and had entered into a bond with sureties for the payment thereof. Reg. Lib. 1684. A. fol. 586.

Case 323.
26 *Maii.*
In Court.
Lord Keeper.
2 Vent. 367.
Post Case 343.
2 Ch. Rep. 383.
2 Ch. Ca. 167.
S. C.

WHITMORE *versus* WELD.

Devise of a personal estate to a trustee in trust for testator's only son, and the heirs of his body; and if his son die during his minority, and without issue, then to *A.*; and makes his son executor, and *B.* executor in trust for his son during the son's minority. The son lives to 18, and then dies without issue; this personal estate shall go to the executor of the son, and not to *A.*

The case arose upon the will of Mr. *Whitmore*, who by will, dated 18th *January*, 1675, devised the surplus of his personal estate, being of the value of 30,000*l.* to the Lord *Craven*, during the minority of *William Whitmore* the testator's only son, for the use of him and his heirs lawfully descended from his body, and to the use of the issue male and female descended from the bodies of his sisters *Elizabeth Weld*, deceased, *Margaret Flemish* and *Anne Robinson*, in case his son died during his minority without issue, and made

WHITMORE v. WELD.

his son executor, and the Lord *Craven* executor during the son's minority. The testator died in 1678, his son being about the age of thirteen, and the Lord *Craven* proved the will during the minority of the son; and afterwards the son died without issue, being at his death of the age of eighteen, and having never taken upon him the executorship of his father; and before his death he made his will, and thereby devised to his wife (the plaintiff) all his estate real and personal, and what else he could give her, and made her sole executrix: and the question was, whether she as executrix to her husband, or the children of the testator's sisters, should have this personal estate.

For the plaintiff it was insisted, that here was an estate by this devise absolutely vested in the son, and that no words in the will could afterwards divest it, and that it is against the nature of a personal estate to be thus limited over; (1) and the son had by this devise an absolute right in the personal estate, and might spend it or forfeit it: and the case of *Clent* and *Ridges* was cited, where a man devised 6,000*l.* a-piece to his sisters, but if they should happen to die before twenty-one, he devised it over, and the Lord *Shaftesbury* in that case decreed for the remainder-men, but that decree was afterwards reversed upon an appeal to the House of *Lords;* and it was much insisted on, that the devise to the Lord *Craven* being during the minority of the son, *that* ought in this case to be intended until he should attain the age of seventeen years; and the Lord *Craven* being also made executor during the minority of the son, it shews the testator intended that the Lord *Craven's* interest in the personal estate should determine when the son attained the age of seventeen years, and the personal estate being then absolutely vested in him, cannot afterwards be divested.

For the defendants it was insisted, that the intent of the testator and the letter of the will carried this estate to them, and *that* devise did well enough consist with the rules of law, here being no estate actually vested in the son, it being

[328] a trust in the Lord *Craven;* and that *during minority* was always taken in our law to be till the party attained the age of twenty-one years.

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(1) As to the entail of terms for years, and personal chattels, vide *Manning's* Case, 8 Co. 94. *Lampett's* Case, 10 Co. 46 b. *Child* v. *Baily*, 1 Jo. 15. Cro. Jac. 459. Palm. 48, 333. Eq. Ca. Ab. 192, pl. 5. S. C. *Duke of Norfolk's* Case, 3 Ch. Ca. 1. *Hyde* v. *Parrat & Al'*, 1 P. Wms. 1.

WHITMORE v. WELD.

Lord Keeper said he was troubled to see the intent of the party in any case disappointed, but more especially in the case of a will, which is many times made in haste, when there is not time for that advice and deliberation which may be used in other cases; and therefore as far as the rules of law will permit, the intent of the party ought to be supported; and said, this will might certainly have been so penned that it should have gone over to his sister's children: and he took the question touching the minority, to be a considerable point; and observed, that though an infant at seventeen might administer, (1) yet he could not till he was of full age commit a *devastavit*; (2) and said, if it be a trust vested, the limitation over must not be endured; but if it be not vested, it will come near the case of *Massenburgh* and *Ash*: but said he would consider of it, and have the opinion of the *Judges*. (3)

Though an infant at 17 may administer, yet he cannot commit a *devastavit* until 21.

Ante Case 230. 298.

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(1) But administration shall be granted to another till he is 21, because he cannot enter into a bond with sureties as required by the statute of Distributions, 22 and 23 Car. II. cap. 10. 3 Bac. Abr. 13, B. 1. Toller's Law of Executors, 73. So in the case of infant sole executor, administration with the will annexed, shall be granted to the guardian of the infant, or such other person as the Spiritual Court shall think fit, until the infant shall attain 21, and then and not before probate shall be granted to him, and such guardian shall then have the same powers as an administrator, *dur. minor. ætat.* Vide stat. 38 G. III. cap. 87. sect. 6, 7.

(2) Nor can a feme covert executrix commit a *devastavit*, though she may be charged for waste done by her husband, if she survive, on a judgment obtained against him, *Horsey* v. *Daniel*, 2 Lev. 145. Et vide *Anon.* 2 Vent. 45. *Nelthrop* & *Ux.* v. *Anderson*, 1 Salk. 114. How far a husband is to be charged for a *devastavit* committed by his wife executrix *dum sola*, or after the marriage, *Kings* v. *Hilton* & *Ux*, Cro. Car. 603. Lutw. 672.

(3) Reg. Lib. 1684. B. fol. 455. Et vide post 347, where decreed to be a trust vested in the son, and remainder over void.

DE

TERMINO S. TRINITATIS,

1 *Jacobi II.* 1685.

IN CURIA CANCELLARIÆ.

Case 324.

ANONIMOUS.

Eq. Ca. Ab. 349, (B). pl. 1.

If a member of parliament sues at law, and a bill is brought to be relieved against that action, the court will grant an injunction till answer or further order.

Per Cur'. Though the court will not proceed against a member, that has privilege of Parliament; yet if a Parliament Man sues at law, and a bill is brought here to be relieved against that action, the court will make an order to stay proceedings at law till answer or further order. (1)

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(1) Vide *Wildbore & Al'* v. *Parker & Al'*, Mose. 125.

Case 325.

1 *July.*

At the Rolls.

Sir John Churchill Master of the Rolls.

HALL *versus* DENCH.

A. devises lands, and then makes a mortgage thereof in fee. This is a revocation in law; but otherwise in equity.

Post Case 334.

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The case was, *I. S.* in 1663 by his will in writing devises the lands in question to *A.* in tail male, remainder to the plaintiff in fee; and having afterwards occasion for money, mortgages these lands in fee, and in 1683 dies. *A.* being dead without issue, the plaintiff, who had the remainder, brings his bill to be let into the benefit of this devise. It was objected by the counsel for the defendant, who was the heir at law, that this mortgage being a mortgage in fee, was an absolute revocation of the devise; if it had been but a mortgage for years, then they did admit the reversion would have passed, and that would have carried with it the equity of redemption, and so the revocation should have been *pro tanto* only. But here being an estate in fee mortgaged, *that* goes to the whole, and is a full and absolute revocation in

law; (1) and being an absolute revocation in law, there was no reason for equity to aid the plaintiff against the heir at law. 1*st*. Because it is a will made above 20 years before the death of the party. 2*dly*. The testator intended not an immediate estate to the plaintiff, and he was but very remotely considered in the making this will, the testator having put the whole estate in the power of *A*. who having an estate tail might have barred the remainder which was devised to the plaintiff.

For the plaintiff, it was insisted that this mortgage should be a revocation only as to the mortgage-moneys; and though in law it was an implicit revocation of the whole estate, yet equity will consider the intent of the party, which was only to supply his occasions with the money, and not done with a design to revoke the devise in the will; and the case of *Thorne* and *Thorne* was insisted on as a case express in point, that a mortgage, though in fee, shall be a revocation *pro tanto* only; and the case of one *Haggott* in the time of the *Lord Keeper Coventry* was likewise cited, as also the case of *Mountague* and *Jeffereys* in *Roll*. (2)

Ro. 1. Abridgment 616. Letter U. No. 2.

The *Master of the Rolls* was of opinion, that a mortgage should be a revocation *pro tanto* only. (3) And in regard there were four or five witnesses, who swore that after this mortgage the testator declared his former will should stand, the *Master of the Rolls* thought that was a new publication of the will, and then certainly the equity of redemption well passed: though it was objected, that such parol declarations, since the statute of *Frauds* and *Perjuries*, would not amount to a new publication. And he said, there were four things which equity favoured, *viz. liverie, attornment*, (4) *assent to* a legacy, and the new publication of a will favoured in equity.

Livery, attornment, assent to

(1) Vide *Sparrow* v. *Hardcastle*, 3 Atk. 798. And see that case for the ground on which a mortgage in fee is considered as no revocation in equity.

(2) Vide also *York* v. *Stone* & *Al*, 1 Salk. 158, where held to be a severance of a joint tenancy.

(3) So *Rider* v. *Wager*, 2 P. Wms. 334, and cases cited in note there, where mortgagee by lease and release and fine. *Duke of Bridgwater* v. *Bolton*, 2 Lord Raym. 968. *Carte* v. *Carte*, 3 Atk. 179. *Parsons* v. *Freeman*, ibid. 748. *Jackson* v. *Parker*, Amb. 687. Contra *Thomas* v. *North*, 1 Ch. Rep. 153. Et vide *Perkins* & *Al* v. *Walker* & *Al*, ante 97, and cases cited in note there. So not only a mortgage in fee but a conveyance in fee for payment of debts is a revocation *pro tanto* only in equity, provided testator remains seized of the same estate, *Williams* v. *Owen*, 2 Ves. jun. 600. *Cave* v. *Holford*, 3 Ves. 654. *Earl Temple* v. *Dutchess of Chandos*, 3 Ves. 685. [*Harmood* v. *Oglander*, 6 Ves. 198. 8 Ves. 106. *Vawser* v. *Jeffery*, 16 Ves. 519. 2 Swan. 268.]

(4) On the doctrine of Attornment vide 1 Inst. 309 a. Wright's Ten. 30, 31. stat. 4 Anne, cap. 16. sec. 9. 11 Geo. II. cap. 19.

HALL v. DENCH.

a legacy, and *the new publication of a will:* (1) and in either of those cases a slender evidence would serve turn. (2)

And whereas the defendant's counsel pressed for a trial at law, whether there was a new publication or not, the *Master of the Rolls* said, the cause must properly end here, and where the court has a jurisdiction as to the end, it must have likewise as to the means; and since he was fully satisfied in the evidence, he said, he would not send it to a trial at law; and decreed for the plaintiff.

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(1) A court of equity does not favour revocation contrary to the plain intention of the testator, per Lord Chan. *Carte* v. *Carte*, 3 Atk. 179.

(2) See the case of *Cotton* v. *Cotton*, cited *Alford* v. *Earle*, 2 vol. 209, where the testator saying his will was in a box in his study, was held to amount to a re-publication.

Case 326.

MARSDEN *versus* BOUND.

2 *July*.

Master of the Rolls in Court.

Eq. Ca. Ab. 234, pl. 2.

Depositions of a witness examined *de bene esse*, he dying before he was examined in chief, ordered to be read at a trial at law. Hard. 332. 1 Salk. 278. (3). Jo. Ch. J. 164. Raym. 335, 336.

THE plaintiff examined his witnesses *de bene esse* in *Michaelmas* vacation, and in *Hilary* term following the defendant puts in an answer, and about five weeks afterwards, before any replication filed, or examination in chief, the witness dies: and now it was moved by Mr. *Serjeant Maynard*, that the plaintiff might be at liberty to read this deposition at law; and inasmuch as by the strict rules of the common law, no depositions of witnesses taken *de bene esse*, or before issue joined, can be read or given in evidence, it was also prayed that the defendant might be ordered not to oppose the reading of this deposition at a trial at law; which the *Lord Keeper* held reasonable, for that otherwise an examination *de bene esse* would be to no purpose.

Mr. *Porter* this day moved the *Master of the Rolls* to discharge this order, because the plaintiff had been negligent, or otherwise he might have examined his witness in chief, the answer having been put in above five weeks before the witness died; or he might have tried the matter at law in *Hilary* Term, before the death of the witness. But it was answered, the plaintiff could not go to law before he had the defendant's answer, to see if he would confess the matter of

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fact; and that he stood out two months in contempt before he would answer; and though the plaintiff might have re-

plied within the five weeks, yet he could not well have examined in chief, the witness and the plaintiff both living in *Cheshire;* and this was not such a lapse of time as ought to deprive him of the benefit of the evidence; and the rather, for that (though it is not regular by the course of the court) the defendant's commissioners joined in the execution of this commission, so that here could be no foul practice; and therefore the last order was confirmed. (1)

(1) Reg. Lib. 1684. B. fol. 489. 4 Mod. 146. 1 Salk. 278, S. C. *Cann* Vide Wyatt's Pract. Reg. 187. *Howard* v. *Cann*, 1 P. Wms. 568. v. *Tremaine*, 1 Show. 363. Carth. 265.

URLIN *versus* HUDSON.

Case 327.

Eq. Ca. Ab. 14, pl. 9.

THE defendant pleads that the plaintiff brought a former suit for the same matters, which suit is still depending for aught he knows to the contrary.

Not necessary in a plea of a former suit brought for the same matter, to aver, that such suit is depending.

For the plaintiff it was insisted, that this plea was not good, because he does not positively aver that the former suit is still depending, and no issue can be taken upon his knowledge to the contrary.

But the *Master of the Rolls* allowed the plea, because the Plaintiff ought not to have set it down to be argued, for by that he admits that the former suit for the same matter is depending, but the plea ought to have been referred to a Master to examine whether there was a former suit depending, for the same matter, or not; and said, there needs no positive averment that the former suit is still depending, for that is examinable by the Master; and the defendant never swears a plea of a former suit depending, but it is always put in without oath. (1)

Plea of a former suit depending for the same matter is put in without oath.

(1) Reg. Lib. 1684. B. fol. 523. Being matter of record, vide Wyatt's Prac. Reg. 329. *Sed nota.* It is stated in the Register's Book, "The defend- "ant for plea setting forth a former "suit *yet depending* between the "same parties, &c." but in plea of a suit in Chancery, in *Jamaica*, the year and term in which such suit was instituted, should be set out and averred, although it seems doubtful how far such plea would hold, *Foster* v. *Vassall*, 3 Atk. 586. Mitf. Pleadings, 201. (3d ed.) Et vide *Anon.* 1 Ves. jun. 484.

This vacation died Francis Lord Guildford, Lord Keeper *of the Great Seal of* England, *at his house at* Roxden *in* Comitat' Oxon. *And the Right Honourable* George Lord
[333] Jefferies, *Baron of* Wem, Lord Chief Justice of England, *had the custody of the Seal delivered to him at* Windsor, *by the style and title of* Lord Chancellor of England. *And Sir* Edward Herbert, *Chief Justice of* Chester, *was made Lord Chief Justice of* England, *and sworn of his Majesty's Privy Council; and Serjeant* Lutwich *was made Chief Justice of* Chester.

This vacation also died Sir John Churchill, *the Master of the* Rolls, *at his house in* Somersetshire; *and Sir* John Trevor, *the Speaker of the House of Commons, was made* Master *of the* Rolls.

This vacation also died Sir Thomas Walcott, *one of the Justices of the* King'sBench; *and Mr.* Baron Wright, *one of the* Barons *of the* Exchequer, *was removed into the* King's Bench; *and Sir* Edward Nevill *was made a* Baron *of the* Exchequer.

DE

TERM. S. MICHAELIS,

1 *Jacobi II.* 1685.

IN CURIA CANCELLARIÆ.

Case 328.

THE *Lord Chancellor* declared, that he would not allow of the rule of dismissing a bill with 20*s.* costs; but that for the future the defendant should have the costs he should swear he was out of purse; but in such affidavit he must specify the particulars, that the court may judge of the reasonableness of them, if there should be occasion. (1)

Eq. Ca. Ab. 15, pl. 1. 102, pl. 5.

Bill not to be dismissed on 20*s.* costs, but defendant to be paid the costs which he swears he is out of purse.

He also declared, that the general affidavit of having material witnesses beyond sea, should not be sufficient for a new commission, but the witnesses must be named in the affidavit, and the point mentioned to which they can materially depose. (2)

General affidavit of having a material witness not sufficient for a new commission, but the witness must be named in the affidavit, as also the point to which he is to be examined.

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(1) But now by stat. 4 Anne, cap. 16. sec. 23., full costs to be taxed, are to be allowed in all cases where plaintiff dismisses his own bill, or it is dismissed for want of prosecution.

(2) But circumstances may arise from the nature of the case on which the court will grant the commission, although the affidavit is not sufficient, *Jessup* v. *Duport*, Barnard. 194. 2 Eq. Ca. Ab. 205. pl. 3. [In *Oldham* v. *Carleton*, 4 Bro. Cha. Rep. 88. and *Rougemont* v. *Royal Exchange Assurance Company*, 7 Ves. 304., it was held unnecessary to state the nature of the evidence; but in *Mendizabel* v. *Machado*, 2 S. & S. 484., the *Vice-Chancellor* cited and adhered to the rule laid down in the text.]

Case 329.

BRATHWAITE *versus* BRATHWAITE.

24 Octobris. In Court. Lord Chancellor.

Eq Ca. Ab. 114, pl. 8. S. C.

A. B. a widower settles lands to raise 100*l.* a-year for his eldest son, and 100*l.* a-piece for his younger children, and afterwards he marries again, and has children by his second wife.

TENANT in tail with the remainder in fee to himself levies a fine, (1) and settles his estate on trustees, in the first place to pay his son and heir 100*l. per ann.* and then to make a provision of 100*l.* a-piece for his younger children, sons and daughters, to be raised and paid according to their seniority, and a maintenance in the mean time.

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Decreed the children by the second wife were equally entitled with the other younger children.

In this case the *Lord Chancellor* decreed, *first*, that whereas at the time of the settlement, the party that made it was a widower, and had eight children by his first wife, and declared he intended not to marry again, yet in regard he afterwards married a second wife, and had many children by her, that the children by this second wife were equally entitled with the children of the first to have the benefit of this provision for younger children.

Though the portions of the younger children were by the settlement to be paid according to their seniority, yet in case of a deficiency they shall be paid in average.

2dly. That whereas the deed directs the provision for his younger children should be raised and paid according to their seniority, that yet in case there should happen a deficiency, the eldest should not have more, and the younger less, but they should be all paid in average. (2)

The portions of the younger children who died in the life of their father, not to be raised in favour of the administrators. Otherwise if any of the daughters had married in the life of their father, and afterwards died.

3dly. That whereas many of the younger children by the first wife died in the lifetime of their father, that the administrators of the children so dead should have no benefit of this provision, but the same should cease; but in case any of the daughters had been married in the lifetime of the father, and died, the husbands as their administrators should have

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(1) The state of the case is somewhat different, Sir *Thomas Brathwaite* being tenant in tail expectant of the premises in question, joined with his father the tenant for life in possession, in a deed bearing date 17th March, 1665, by which they covenanted to levy a fine to trustees therein named, before the end of Trinity Term then next, of the premises in question, to the uses and upon the trusts, (*int. al.*) above-mentioned, after the death of Sir *Thomas* and his father. It does not appear that any fine was levied at that time, but it is stated, that after the birth of several of the plaintiffs, the children of the said marriage, and about six years after the date of the deed of settlement, a fine was levied to Sir *Thomas Brathwaite* alone, pursuant to the said covenant. R. L.

(2) So in respect of legacies, vide *Brown* v. *Allen*, ante p. 31.

had their portions; and no certain time being appointed for payment, but the same being left indefinitely, it does not naturally attach till the death of the father; and his *Lordship* took a difference betwixt a portion or provision, and a legacy payable at the age of 21 years, &c. (1)

BRATHWAITE v. BRATHWAITE.

4thly. That whereas *Thomas* the son and heir, who was to have 100*l.* *per ann.* in the first place, had purchased in a statute which was an incumbrance on the estate, that he should be allowed no more than what he really paid for it; (2) and that the whole estate must in the first place be looked on as liable to satisfy this incumbrance, and then to raise the 100*l.* *per ann.* and arrears, * and the surplus for raising the provisions for younger children, but that their maintenance should go on in the mean time. (3)

The heir buying in an incumbrance on the estate charged with the portions, allowed no more than what he really paid.

Vide the next Case.

[*336]

(1) This part of the decree relating to the death of the married daughters, in the lifetime of the father does not appear in the Register's Book. The words of the decree are, "But with "this, that the younger children, "which died in the lifetime of Sir "*Thomas Brathwaite*, (the father) "before their portions became pay- "able, the provision or portion of such "children so dying shall not be a "charge on the said estate, or any al- "lowance thereof made to the defend- "ant *Thomas* (the eldest son) as their "administrator, to prejudice the plain- "tiffs, there being no interest vested "in them to give the defendant *Thomas* "a title thereunto." R. L.

(2) An heir or trustee who buys in an incumbrance may (under circumstances) be allowed on account, the whole money due thereon, *Darcy* v. *Hall*, ante p. 49. And further on this head, *Long* v. *Clopton*, post 464. *Williams* v. *Springfield*, post 476.

(3) Reg. Lib. 1685. A. fol. 37.

PHILLIPS *versus* VAUGHAN.

Case 330.

27 Octobris.

In Court. Lord Chancellor.

A. mortgages his land to *B.* *C.* a stranger buys the interest of *B.* for less than was really due on the mortgage, and the heir of the mortgagor brings his bill to redeem, and the question was, whether *C.* shall be allowed more than he really paid.

A stranger gets an assignment of a mortgage for less than is due. The mortgagor or his heir shall not redeem without paying the whole that is due.

For the plaintiff it was insisted, that a stranger purchasing an incumbrance, that had no interest before in the estate, so that it was not to protect his purchase or any thing of that nature, ought to be allowed no more than he really paid.

Lord Chancellor. This case has neither point nor edge; for there is no colour why, when the heir of the mortgagor

PHILLIPS v. VAUGHAN.

comes to redeem the mortgage, he should not pay the whole that is due on the mortgage. If another man has met with a good bargain, there is no equity for the heir of the mortgagor to deprive him of the benefit of it, and make an advantage thereof unto himself: but if a man had purchased without notice of this incumbrance, he might possibly have had an equity to have redeemed the incumbrance for what was really paid for it. (1)

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(1) The bill was brought by the assignee of mortgagee against the heir, and the plaintiff having been some time in possession, was decreed to account for, and allow the defendant, the amount of the rents and profits received by him during such possession. Reg. Lib. 1685. B. fol. 38. Vide *Darcy* v. *Hall*, ante p. 49. *Brathwaite* v. *Brathwaite*, pre. page. *Long* v. *Clopton*, post 464. *Anon.* 1 Salk. 155, cited in note (A). *Robinson* v. *Pitt*, 3 P. Wms. 251. Quod vide on this head where executor renounces.

Case 331.

27 *Octobris.*

In Court. Lord Chancellor.

OLDFIELD *versus* OLDFIELD.

Eq.Ca.Ab. 266, pl. 3. 335, pl. 2. One by his will gives 3,000*l.* to his younger children, which was secured by mortgage from *A.* and declares that if his eldest son does not pay this 3,000*l.* then his lands shall go to the younger children.

SIR *John Oldfield* by his will amongst other things devises as follows, *viz.* *Item*, I give 3,000*l.* to be equally divided amongst *A.*, *B.* and *C.* my three younger children, which said sum is in the hands of Sir *John Tufton*; and in his said will he adds this clause, *viz.* And *for the more sure payment of the said sum, in case his son and heir, whom he thereby appointed his executor, should not pay the same according to his will, then he devised his lands to his younger children for the raising and payment thereof, and appoints the same to be paid unto them at twenty-one or marriage, which should first happen, and a maintenance out of his lands in the mean time.

A. brings a bill to redeem his mortgage, and to pay in his mortgage-money and pays it pursuant to the decree, and the master puts it out upon a security that proves ill. The eldest son shall not be compelled to pay it over again to his younger brothers.

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Sir *John Tufton* being minded to pay in this 3,000*l.* exhibits his bill against the executor and the infants, who appeared by their mother as their guardian, and obtains a decree for redemption of his mortgage, and a *Master* is appointed to see the moneys put out on security for the benefit of the infants. The *Master* makes his report, and thereby approves of securities for placing out the money, *viz.* Sir *Robert Viner's* bond for 1,000*l.* Alderman *Backwell's* bond

for another 1,000*l.* and *Meynell's* bond for the third 1,000*l.* and the money is put out accordingly. OLDFIELD *v.* OLDFIELD.

These persons proving insolvent, the infants by their now bill would resort to the lands, and charge the estate of the heir with this 3,000*l.*

The counsel for the plaintiffs, urged, that where there were two funds for securing the payment of infants' portions, if one failed they might resort to the other; and put this case, that if a man by his will had charged the lands of his heir for payment of portions to his younger children at twenty-one or marriage, and the heir in the minority of the younger children should exhibit his bill to pay in the moneys and have his lands discharged, the court of chancery in such case would not discharge his lands; nor in any case, where infants were concerned, change a real into a personal security.

Lands of an heir are charged with portions to infants at 21 or marriage; the portions shall not be admitted to be paid in before they grow due, in ease of the land.

But the *Lord Chancellor*, upon the first opening of the cause, took the case to be clear against the plaintiffs; for that the intention of the testator appeared to be that there should be an effectual payment of the 3,000*l.* For Sir *John Tufton's* security might have failed, or his heir and executor might have received it of him, and have refused or neglected to have paid it over to the infants; and in either of those cases the lands should have been charged; but they were only supplementally chargeable, in case of such a defect or deficiency: but here, when there has been a real and effectual payment, and the moneys put out upon securities, which could not then be objected against, but were approved of by the mother of the infants, who by will was made their guardian, and allowed of by the court, there could be no reason after all this, that the heir should be charged with these moneys; (1) nor can it be an objection that the moneys were paid in before the time appointed by the will, *viz.* before the infants were either married or had attained twenty-one years of age, for it was not in the power of the heir and executor to compel Sir *John Tufton* to keep the moneys in his hands, when he was minded to pay it in; and said, the case put by the plaintiffs' counsel was not like this, but admitted that the lands of the heir, when charged for payment of portions to infants at twenty-one or marriage, shall not be [336]

(1) But the practice of laying out the money of the suitors on private security has long since fallen into disuse. It is now laid out in the three per cent. bank consol. ann. or some other government security, in the name of the Accountant General in the cause, vide Stat. 12 Geo. I. cap. 32.

OLDFIELD v. OLDFIELD. discharged before that time, nor that a real security for infants' portions shall be changed into a personal one, where the lands are originally charged; but here the lands were only supplementally charged, in case the 3,000*l.* had not been effectually paid; and the payment made in this case he adjudged to be effectual, and according to the intent of the testator, and therefore dismissed the bill. (1)

(1) But as to the maintenance allowed out of the lands the decree is, "That the same be paid by the defendant after the rate of 30*l.* per ann. each according to the directions of the will, during the life of the plaintiffs' mother, she having been intitled under the former decree to the interest of the 3,000*l.* for her life, the plaintiffs discounting what they have already received, and the testator's lands to stand charged with the payment of the said maintenance." Reg. Lib. 1685. B. fol. 152.

Case 332. *Eodem die.* *In Court. Lord Chancellor.*

DUKE of SOUTHAMPTON, as Administrator of his late Wife, ... } Plaintiff;
and
CRANMER & Al', Executors of SIR HENRY WOOD, ... } Defendants.

[339] THE bill was brought by the Duke of *Southampton*, who married the daughter and heir of Sir *Henry Wood*, as administrator to his late wife, for an account of the personal estate of his said wife, *viz.* the profits of her real estate received by trustees in her lifetime. The case arose upon the construction of a deed of settlement and will made by Sir *Henry Wood*, wherein, amongst other things, it was recited, that a marriage was intended between the Duke of *Southampton* and the daughter of Sir *Henry Wood*; and then comes a clause, that in case the daughter should live to attain the age of *sixteen* years, and should refuse to marry the said Duke of *Southampton*, then the said *Duke* should have 20,000*l.* out of his personal estate; and afterwards there is another clause to this effect, *viz.* And if it shall happen, that the said intended marriage shall not be had till after his daughter attained her age of *sixteen* years, then he upon such marriage had, settles his real and personal estate upon the Duke and his intended wife for their lives, &c.

The marriage takes effect, the lady being under the age of *sixteen* years; she lives to attain *sixteen* years, and before *seventeen* dies without issue.

The defendant's counsel would have it, that by this settlement, to which the will refers, the personal estate was not vested, so as to entitle the administrator of the wife, by reason the marriage was had before she attained the age of *sixteen;* and that it was Sir *Henry Wood's* intent to restrain his daughter from marrying before she attained that age.

Lord Chancellor. I take the intent to be quite otherwise. The thing chiefly aimed at was that there might be a marriage had betwixt the *Duke* and Sir *Henry Wood's* daughter, and for that intent is the clause of 20,000*l.* penalty, in case at *sixteen* years of age she should refuse to marry him; and this latter clause is only to bring in that 20,000*l.* again into the personal estate, and to be settled to the same uses with the rest, in case the marriage should be had after her age of *sixteen* years; and to me it does in no sort imply, that they might not marry before that time; and therefore decreed an account, &c. (1)

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(1) Reg. Lib. 1685. A. fol. 128. The deed was by lease and release, and is very shortly stated in the Register's Book. After reciting that the said treaty for the marriage was with the approbation of his Majesty, and a declaration that on the marriage taking effect, his Majesty would settle lands in England on the plaintiff of 2,000*l.* per ann. the clause alluded to is as follows. The lands therein mentioned were conveyed by Sir *Harry Wood* to trustees therein named "Upon trust for the plaintiff "and his Duchess, and their children, if "any, and if she should refuse to mar- "ry the plaintiff, or die before the "age of 16, then that the trustees "should raise out of the said manors, "&c. the sum of 20,000*l.* to be paid "to the plaintiff." The deed is dated the 22d and 23d of May, 1671, and on the 24th of the same month of May, Sir *Henry Wood* made and executed his will, reciting and confirming the said deed, and declaring that if the plaintiff or his brother *George*, Lord *Palmer*, should not marry the said *Mary*, or should die without issue by her, or if either of them should have issue by her, after the death of such issue, without issue, then as to those premises, and all other his lands, &c. upon trust for the said *Mary*, as therein mentioned. Entered *Duke of Southampton* v. *Bishop of Litchfield.* The decree in this case was affirmed in the House of Lords, 14th April, 1690. Journ. Ho. Lords, 14th vol. p. 464. Show. P. C. 83.

Case 333. THRUXTON *versus* ATTORNEY-GENERAL.

4 *Novembris. In Court. Lord Chancellor.*

One seized in fee of lands limits a term to trustees for a *hundred* years, upon such trust as he by deed or will should appoint, and for want of such appointment to attend the inheritance; and afterwards by a *nuncupative* will gives *all, all* to *I. S.* and being a bastard dies without issue: this will not pass the trust of the term.

A MAN seized of lands in fee, by settlement limits a term for a *hundred* years to trustees in trust for such uses, intents, and purposes, as he by deed or will in writing should declare, direct, limit, or appoint, and for want of such will or deed to attend the inheritance. This man being a bastard dies without heir, having first made a *nuncupative* will, and thereby devised as follows, *viz. I give all, all to I. S.* who had now administration with the will annexed; and the question was whether this term should escheat with the inheritance.

It was insisted by the counsel for the plaintiff, *first*, That this was not a prerogative case, and there was no difference in the case of an escheat, whether the lands were to come to the king or to the mesne lord.

2ndly. A term limited to attend the inheritance does not at common law attend the inheritance, for there in the eye of the law it is a term for years, and must go in a course of administration, if equity did not interpose; and where the case does not carry an equity along with it, the chancery ought not to interpose, but let the law take place: and an escheat (which is properly only where there is no other person to take) is not to be favoured in equity, especially where it turns to the wrong of a third person; and even in equity a term limited to attend the inheritance shall in many cases be severed from it, as if a man dies indebted, a term limited to attend the inheritance shall be assets, and made liable to his debts.

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3dly. Where a man comes in paramount him who limited a term to attend the inheritance, as the Lord by escheat does, he comes in *le post*, and shall have no benefit of the term; and for that reason it was ruled in the case of *Pheasant* and *Pheasant*, (1) that a widow, who claimed dower, coming in paramount, should have no benefit of the term that was limited to attend the inheritance.

4thly. That this nuncupative will was long before the statute of *Frauds* and *Perjuries*, and then a man might dis-

(1) 1 Ch. Rep. 181. 2 Vent. 340. S. C.

THRUXTON v. ATTORNEY-GENERAL.

pose of a trust by parol; and that the word *all* in this nuncupative will would certainly carry the term; and therefore it was insisted, that it was well appointed to the administrator with the will annexed.

A term vested in trustees is not assets to pay debts; otherwise if the term be in the party himself and the inheritance in trustees.

Lord Chancellor. I do not take it, that what Mr. *Serjeant Pemberton* laid down as an established rule, is so; for if a man seized in fee raises a term and lodges it in trustees to attend the inheritance, and afterwards dies indebted, I never heard, that that term should be made assets, but have heard it often denied: (1) but indeed where the inheritance is in trustees, and a man has a term in his own name, which is limited to attend the inheritance, and dies indebted, the term in that case shall be liable to his debts; for it is assets at law. But as to the principal case I take the question to be no more than, whether a term attendant on the inheritance may escheat or not, for if it will in any case, it must escheat here. I agree that generally speaking a man before the statute of *Frauds* and *Perjuries* might dispose of a trust by parol; and I also agree, that the words *all, all,* would be sufficient to pass a lease for years; (2) but in this case the term being settled by deed expressly upon these trusts, *viz.* for such uses, intents and purposes as he by deed or his last will in writing should appoint, and in default of such appointment then to attend the inheritance, this restrains and ties up his hands from making any parol disposition; and I take his intent by the words *all, all,* to be all that he could dispose of by parol; and so the King in this case is not in barely in the *post;* but in the *per* also; for the term for years goes with the inheritance by the express limitation of the party. (3)

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(1) *Ratcliff* v. *Graves*, 2 Ch. Ca. 152. Et vide *Tiffin* v. *Tiffin*, ante p. 1, and cases cited in not. there.

(2) The words *all my estate* would carry the fee. *Countess of Bridgewater's Case*, 6 Mod. 110. And where mortgage of the term to one who had no notice of its attending the inheritance, term shall be held against the King, *How* v. *Nicholl*, Pre. Ch. 125. But the word estate, as giving a fee may be qualified by after-words, so as to make only an estate for life. *Doe on dem. of Small & Al'* v. *Allen*, 8 Term. Rep. 147, 497. Et vide fully on this head, *Woollam* v. *Kenworthy*, 9 Ves. 137. [See further as to the operation of the word "estate" in a devise, *Barry* v. *Edgeworth*, 2 P. W. 523. *Price* v. *Gibson*, 2 Eden, 115. and cases collected in the notes there.]

(3) Bill dismissed. Reg. Lib. 1685. B. fol. 52. *Sed quære*, Whether where the Lord has the principal thing in the *post*, he can have the accessory in the *per*, and the inheritance is the principal thing, and the term is only the accessory.

Case 334.

HALL *versus* DENCH.

27 Novembris. Lord Chancellor.

Ante Case 325.

THIS cause coming this day to be heard before the ***Lord Chancellor***, upon an appeal from the decree of the ***Master of the Rolls***, he confirmed the decree, and declared, though the mortgage in fee was a revocation at law, yet in equity it should not be taken for a total revocation; but the devisee should be admitted to the redemption: for the intent of the mortgagor making the mortgage could be no other than only to serve his special purpose of borrowing money to supply his present occasions. (1)

(1) Reg. Lib. 1685. A. fol. 117.

Case 335.

JEVON *versus* BUSH.

Eodem die. In Court.

A trustee in a recognizance releases it without any consideration. Decreed to pay the principal and interest not exceeding the penalty.

HENRY BEARD, Lord ***Bellamount*** in 1647 being about to leave ***England***, and having been in arms for ***King Charles*** the ***First***, and under great oppressions from the then usurped powers, lent 600*l.* to one *Gardiner* of *Croydon* on a recognizance of 1,000*l.* which he took in the name of the defendant ***Bush***, and intended it as a provision for the plaintiff his infant daughter, then but two years old; and ***Bush*** at the same time executed a declaration of the trust, and covenants that the plaintiff might receive and enjoy the full fruit and benefit of this security, without any hindrance or disturbance from him or any claiming under him. Soon afterwards the Lord ***Bellamount*** goes beyond sea, and dies in ***Persia*** in 1654. *Gardiner* being about to sell his estate, and the purchaser having notice of the recognizance, ***Bush*** is prevailed upon to acknowledge satisfaction; and in 1657, and not before, the plaintiff had notice of this declaration of trust, and understanding that ***Bush*** had acknowledged satisfaction on this recognizance, brings her bill to be relieved against this breach of trust.

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The defendant by answer insisted, and it was so proved in the cause, that he was but 18 years old when he made this declaration of trust; and insisted likewise, that though the

trust was declared to be for the benefit of the infant, yet it was only to protect the father's estate, who was obnoxious to those times, and that he never had one penny, directly or indirectly, for his acknowledging satisfaction on that recognizance, nor ever had the recognizance in his custody; but the Lord *Bellamount's* widow delivered up the same, and, as he believes, received the moneys due thereon; and that he, at her request, or by her order, or by the order of the Lord *Bellamount*, acknowledged satisfaction on the recognizance, and believes he had some warrant or order in writing from them or one of them for acknowledging satisfaction thereon, but that the same was burnt or lost in the fire of *London*; and insisted that after all this length of time, satisfaction being acknowledged in 1654, above 30 years since, he ought not now to be charged with a pretended breach of trust.

The counsel for the defendant insisted, that the plaintiff ought to prove some fraud in the trustee, or that he received to his own use part of the money.

Lord Chancellor. The proof lies on the defendant's side; he ought to discharge himself, and it is not sufficient for him to say he never received any of this money for his own use: there is no doubt but an infant may be a trustee; and the breach of trust was committed in 1654, after he was of full age; (1) and therefore decreed him to pay the principal money with damages not exceeding 1,000*l.* being the penalty of the recognizance; (2) and cited my Lord *Hobart*, who says that *cestui que trust* in an action of the case against his trustee shall recover for a breach of trust in damages. (3)

An infant may be a trustee.

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(1) *Quære*, If breach of trust during minority, would this court decree him to make it good when of age? Court has held an infant bound by offer made during infancy, in case the other party are thereby delayed, and no application to the court by the infant upon attaining his age, *Cecil* v. *Com' Salisbury*, post 2 vol. 224. So infant will be bound by a condition annexed to the land, if the condition be broken during the minority; and if a recovery be had against an infant in an action of waste, he is barred for ever, Co. Litt. 333 b. So if warranty descend where the entry of the infant is not lawful, the warranty shall bind the infant, Co. Litt. 380 a. So by a condition annexed to a gift, *Scot & Ux.* v. *Haughton*, post 2 vol. 561. And is enabled to convey by stat. 7 Anne, cap. 19. [This Statute, which authorizes Conveyances by Infant Trustees under Orders of the Courts of Chancery and Exchequer, is repealed, and more extensive provisions enacted by st. 6 G. 4. c. 74.] So Chancery will relieve against infant in case of statute, though not extendible against him at law, *Middleton* v. *Shelly*, 1 Lev. 198. Infant executor cannot commit a *devastavit*, *Whitmore* v. *Weld*, ante 328.

(2) The interest on the 600*l.* was to be computed from the time of *Gardiner's* entering into the recognizance. Reg. Lib. 1685. A. fol. 133.

(3) This opinion of *Lord Hobart's* is also cited in *Earl of Kildare* v.

Eustace, post 419. *Sed quære* nevertheless et vide the case of *Barnardiston* v. *Soame*, State Trials, vol. 7 443, where *North*, Lord Chief Justice, in his argument in the Exchequer Chamber says, "No action on the case will "lie for a breach of trust, because the "determination of the principal thing, "viz. the trust, does not belong to the "common law, but to the Court of "Chancery." So trustees to preserve contingent remainders, join in a conveyance; this held plainly a breach of trust, and equity will relieve, *Pye* v. *Gorge*, 1 P. Wms. 128. *Mansell* v. *Munsell*, 2 P. Wms. 678.

Case 336. **DARNELL** *versus* **REYNY.**

Eq. Ca. Ab. 41, pl. 2. S. C.

Where there is an answer to part, and a plea to the residue, the plaintiff cannot except to the answer till the plea is argued, or an order obtained that it shall stand for an answer with liberty to except.

WHERE the defendant answers to part, and pleads to all other matters not answered unto, the plaintiff cannot put in exceptions to the answer till he has first argued the plea, or obtained an order that the plea shall stand for an answer with liberty to except to the matters not pleaded unto. (1)

(1) In this case it appears, that before the arguing of the plea the plaintiff had filed exceptions to the answer, and had got them referred, and the motion was, "That the exceptions might be "set aside," and the order was, "That "all proceedings upon the exceptions "be stayed till the said plea be ar-"gued." Reg. Lib. 1685. A. fol. 85. So as to demurrer, *London Assurance* v. *East India Company*, 3 P. Wms. 326. [And see *Boyd* v. *Mills*, 13 Ves. 85.] But see as to answer to discovery and plea as to relief, where exceptions may be taken as to discovery before plea argued, 3 P. Wms. 227, Note (S). Contra the principal case, *Pigot* v. *Stacie*, 1 Mar. 1774. By *Sewell*, Master of the Rolls. [2 Dick. 496.] *Sidney* v. *Perry*, 29th Oct. 1782, by *Thurlow*, Chancellor. [2 Dick. 602.]

Case 337. **POPHAM** *versus* **BAMPFIELD.**

THE Parliament being prorogued, you may proceed in the account in this court, notwithstanding the appeal. (1)

(1) Reg. Lib. 1685. B. fol. 91. Account directed, vide ante p. 84. S. C. [An Appeal to the House of Lords does not now stay any proceedings in Courts of Equity; but they may be stayed by special order. General Order of the House, 15 Ves. 184. Application for such special order ought to be made to the House, not to the Court whose judgment is appealed from, *Huguenin* v. *Baseley*, 15 Ves. 182. *Lewes* v. *Morgan*, 5 Price, 468. And the same Rule holds in Appeals from the inferior to the superior Judge in the same Court, *Macnaghten* v. *Boehm*, 1 J. & W. 48.]

FREDERICK & Ux' *versus* DAVID & Ux'. Case 338.

Process. Upon an affidavit that the defendant *David* was gone into *Holland* to avoid the plaintiff's demand against him, and he having been arrested on an attachment, and a *cepi corpus* returned by the Sheriff, the court upon a motion granted a *Serjeant at Arms* against him, and upon the return thereof granted a sequestration.

Note.—When a *cepi corpus* is once returned, there is an end of all manner of process, (1) (for no *proclamation* or *commission of rebellion* goes after that) and though a messenger of late years has been usually granted in such cases, yet he is but a new officer, and subordinate to the *Serjeant at Arms*; but regularly in such a case you ought to move, that the defendant may enter his appearance, and be examined within four days, or stand committed. (2) [345]

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(1) Vide *Anon.* ante 116, 154. The court inclined not to grant the motion for a messenger on a *cepi corpus* returned by the Sheriffs of *London*, till the Sheriffs were amerced.

(2) The order in this case recites a former order, whereby it had been ordered that the defendants should, in ten days then next, give security to the approbation of the Master, in the sum of 7,000*l.* to pay what should be due unto the plaintiffs, upon the extent of the account of the estate in question, or in default thereof that the said defendants should pay the plaintiffs the sum of 2,486*l.* according to former orders, and that the plaintiffs should be at liberty to prosecute the defendants for the same, and enforce payment. The defendant refusing to give security, plaintiffs thereupon had served the defendant with a writ of execution, to pay the money, which he likewise refusing, the plaintiffs had thereupon taken out an attachment against the defendants, whereon they were in the long vacation arrested, and the Sheriffs of *London* had taken the defendant *David's* own bond of 40*l.* only for their appearance, whereupon the Sheriffs having returned a *cepi corpus*, plaintiffs had waited ever since to see if defendants would appear, and that it was further alleged that this court did usually upon *cepi corpus* returned, grant a messenger to bring in the body, or cause the Sheriff to be amerced, neither of which would be of any avail to the plaintiff for satisfaction of the said money, the said defendants as the said plaintiffs were informed, not having been at their house, or at the exchange for a great while, and being seen in *Holland*, as by affidavit appeared; so that unless such course might be taken as that a sequestration might be awarded, the plaintiff was in danger of losing the effect of his suit, which had lasted six or seven years, and been very chargeable, and that it was conceived that in such extraordinary cases as this is, this court might as well grant a Serjeant at Arms, whereupon to ground a sequestration, as well as a Messenger, or else there would be a failure of justice thereon. The order then proceeds as follows: "And this "court being informed that by the "practice of this court, a sequestration "might be awarded upon a return of "a Serjeant at Arms, but that it is

" not known that any was ever granted " upon the return of a Messenger, and " that a Messenger is but a new officer, " but that the Serjeant may as well go " as a Messenger, it is ordered that " the Serjeant at Arms attending this " court do apprehend the said defend- " ants, and bring them into this court " to answer the said contempt." Reg. Lib. 1685. A. fol. 583. Vide *Anon.* 2 Atk. 507, and cases cited in not. there. Wyatt Prac. Reg. 392.

Case 339.

7 Decembris. In Court. Lord Chancellor.

Eq.Ca.Ab.155, pl. 6. S. C.

Money to be brought into *hotch-pot* by an orphan shall be brought into the orphanage part only.

BECKFORD *versus* BECKFORD.

THE only point was upon the custom of the city of *London*, where a child that had a portion, but was not fully advanced, was to bring her portion into *hotch-pot*, whether the portion should be brought into the personal estate in general, that so the widow might come in for part of it, or whether it should be brought into the orphanage part only.

Lord Chancellor. It is beyond all doubt that it must be brought into the orphanage part only. (1)

(1) Reg. Lib. 1685. A. fol. 196. Entered *Beckford* v. *Kendall.* Vide post 2 vol. 281. S. C. See also *Fane* v. *Bence*, ibid. 234. *Dean* v. *Lord Delaware*, ibid. 629. *Stanton* v. *Platt*, ibid. 753. *Cleaver* v. *Spurling*, 2 P. Wms. 526. A freeman of *London* devises 700*l.* for mourning, it shall be paid only out of the legatory part, and not out of the orphanage or customary part, *Deaking* v. *Buckley*, post 2 vol. 240.

Case 340.

Eodem die. In Court. Lord Chancellor.

Eq. Ca.Ab.153, pl. 7. S. C.

2 Ch. Ca. 117, 129.

Money given by a freeman of *London* to be laid out in land, and settled on his eldest son for life, remainder to his first and other sons in tail, shall not be reckoned any part of his advancement, and be brought into *hotch-pot.*

ANNAND *versus* HONEYWOOD. (1)

THE point here also arising on the custom of the city of *London*, the question was, whether money given by the father to be laid out in land to be settled on his eldest son for life, remainder to his first, second, third, &c. sons in tail, should be reckoned to be an advancement by part of the personal estate of the father, so as that the son ought to

(1) Cited in *Symonds* v. *Rutter*, post 2 vol. 227. Pre. Ch. 23. S. C.

bring the same into *hotch-pot*, to entitle him to a share of the personal estate. (1)

ANNAND v. HONEYWOOD.

Lord Chancellor. There is no colour to reckon this any part of the personal estate. (2)

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(1) In many instances money agreed to be laid out in land, is, in this court, considered as land, *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 211. *Guidot* v. *Guidot*, 3 Atk. 254, and cases there referred to in not. (1), but it must have the character of land decisively fixed upon it, *Pulteney* v. *Lord Darlington*, 1 Bro. Ch. Rep. 223. *Walker* v. *Denne*, 2 Ves. jun. 170. But money and land are nevertheless considered as of a quite different nature, and the one shall never be taken as a satisfaction for the other, *Eastwood* v. *Vinke*, 2 P. Wms. 616, and cases cited in not. there. *Chaplin* v. *Chaplin*, 3 P. Wms. 247. Et vide *Kettleby* v. *Atwood*, ante 298. *Wheldale* v. *Partridge*, 5 Ves. 388. 8 Ves. 227, S. C. where the cases and doctrine on this head are a good deal considered.

(2) This question was referred to the Court of Aldermen, and they certified as follows: "That a portion in "money given by a freeman of *Lon-* "*don* to his son hath ever been taken "for and towards the advancement of "such son, out of his father's personal "estate, within the custom of the said "city, and that lands of inheritance "settled by the father upon his son, "are no advancement of the son within "the custom, to bar him of his custo- "mary part of his father's personal "estate, but whether the 4,000*l.* ad- "vanced and paid as abovesaid, be by "the custom of the said city an ad- "vancement of defendant, to bar him "of his customary part, they cannot de- "termine, for that they have not known "nor can find in any of the records of "the said city any precedent of the "like case, and therefore they submit, "&c." Reg. Lib. 1685. A. fol. 134.

TUNBRIDGE *versus* TEATHER.

Case 341.

8 *Decembris.*

In Court. Lord Chancellor.

Marriage articles to lay out 1,000*l.* in a purchase of land to be settled on husband and wife for their lives, remainder to the issue of the marriage, remainder to the husband in fee. Husband lays out the 1,000*l.* in the purchase of a great house and gardens, and farm, which would let but at 25*l. per ann.* It is a good performance of the articles.

A MAN upon his marriage, in consideration of 500*l.* portion, by articles precedent to the marriage, covenants with trustees to add 500*l.* more to his wife's portion, *and that it should be laid out in land, and settled to the use of the husband for life, remainder to the wife and the issue of her body by him, remainder to the right heirs of the husband. The husband without the consent of the trustees purchases a farm, on which there was a great house and gardens, and pays 1,000*l.* for it, though in truth it was worth no more than 25*l. per ann.* and takes the conveyance to him and his heirs, and afterwards settles it to the uses in the articles.

The bill was to have the defective value supplied: and for the plaintiff it was insisted, *first*, that this was not a settlement according to the articles, because the purchase was made to the husband and his heirs, and he afterwards settles [* 346]

TUNBRIDGE v. TEATHER.

it to the uses in the articles; whereas if it had been bought with the wife's money, and the conveyance had been made to the uses in the articles, then the estate had not moved from the husband, and consequently it would not have been a jointure within the statute of the 11 *H.* 7. cap. 20. and then the wife being tenant in tail might have alienated it. *2ndly.* One thousand pounds being to be laid out as a provision for the wife, it must be intended a reasonable provision, and it could not be expected that 1,000*l.* should produce less than 50*l.* *per ann.* and it was not intended to be in the power of the husband to defeat such provision by laying out the 1,000*l.* in a fine house and garden, which would not serve to buy bread for the widow; and this appears more plainly from another clause in the articles, by which in case a purchase was not made according to the articles, the wife was to have 700*l.* in money, or 50*l.* *per ann.* at her election.

But the *Lord Chancellor* was of opinion, that the husband having really laid out 1,000*l.* in the purchase, and the father of the plaintiff having viewed the estate before the purchase was made, though it was not of so good a value as might have been purchased with 1,000*l.* it must be taken as a performance of the articles; and therefore dismissed the bill. (1)

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(1) There is a mere entry of dismissal without costs. Reg. Lib. 1685. B. fol. 73. As to performance of articles, the general rule seems to be, that where a party to a deed is obliged to do a particular thing for the benefit of another, and he does a thing equally satisfactory, the intent being answered, this court will presume a satisfaction by implication, but the satisfaction need not be co-extensive with the thing satisfied, *Brown* v. *Dawson*, post 2 vol. 498. *Wilcocks* v. *Wilcocks*, ibid. 558. *Weyland* v. *Weyland*, 2 Atk. 632. Sed vide *Atkinson* v. *Webb*, post 2 vol. 478. *Perry* v. *Perry*, ibid. 505. *Middleton* v. *Pryor*, Amb. 391. As to specific performance of articles, and in what cases this court will decree it, vide *Goring* v. *Nash*, 3 Atk. 185, and cases in note there. As to distinction between performance and satisfaction vide *Blandy* v. *Widmore*, 1 P. Wms. 323, and cases cited in note there. The later cases on the subject of satisfaction in general are *Barclay* v. *Wainwright*, 3 Ves. 466. where a distinction is taken between satisfaction of a legacy and a debt, the court inclining to presume satisfaction in the former case, in the latter not. So *Hinchcliffe* v. *Hinchcliffe*, ibid. 525, 529. *Carr* v. *Eastabrook*, ibid. 564. So the court not inclined to presume satisfaction in the case of strangers as distinguished from that of children, *Sparks* v. *Cator*, ibid. 535. But in the case of presumed satisfaction of a debt by a legacy, there is not one case where a legacy given by a parent is upon any different footing from that of a legacy by any other person, as to the satisfaction of a debt, per *Master of the Rolls*, *Tolson* v. *Collins*, 4 Ves. 490. Et vide *Lee* v. *Brown*, ibid. 362. *Couch* v. *Stratton*, ibid. 391. *Tolson* v. *Collins*, ibid. 491., as to the distinction between legacy and residuary bequest; where pre-

sumed to be a satisfaction by the advance of a portion, *Freemantle* v. *Banks*, 5 Ves. 79, 85. *Wynn* v. *Williams*, ibid. 130. *Osborn* v. *Duke of Leeds*, ibid. 369, 382. *Druce* v. *Dennison*, 6 Ves. 398, which see also as to admission of parol evidence, in the case of claim of double legacies. *Reeve* v. *Brymer*, 6 Ves. 516. As to the extent of a provision by marriage settlement in bar and satisfaction of dower and thirds, *Druce* v. *Dennison*, ub. sup. Et vide *Plume* v. *Plume*, 7 Ves. 258. *Trimmer* v. *Bayne*, ibid. 508. And for distinction as to satisfaction between the case of a double portion and performance of a covenant, ibid. 515. *Robinson* v. *Whitley*, 9 Ves. 577. And as to legacies to servants, dict. per *Lord Hardwicke*, "Legacies "to servants have never been held to "be in satisfaction of debts." *Richardson* v. *Greese*, 3 Atk. 69. But this is at present a question *sub judice*, in a case of *Wallace* v. *Pomfret*, which will probably be found in the 11th vol. of Vesey, jun. Reports. [11 Ves. 542. Other cases on the subject of satisfaction will be found collected in the notes to *Chancey's case*, 1 P. Wms. 410. *Eastwood* v. *Vinke*, 2 P. Wms. 616, and *Goldsmid* v. *Goldsmid*, 1 Swan. 219. The principal case, however, is not a case of satisfaction, but of performance.]

KNIGHT *versus* CALTHORPE.

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Case 343.

Eodem die.

In Court.

Eq. Ca. Ab. 33, pl. 6. S. C.

A. on his marriage settled a rent-charge on his wife for her jointure, and afterwards devises to the wife part of the land charged with the rent-charge might be apportioned.

A MAN upon his marriage charges his lands with a rent-charge for the jointure of his wife, and afterwards by his will devises part of these lands to his wife. The plaintiff's bill was that the lands devised to the wife might bear their proportion of the rent-charge; otherwise the rest of the lands, that were not sufficient to pay the rent, would be clogged with the arrears, which in time would swallow up the inheritance.

Bill is that the rent-charge might be apportioned. Bill dismissed.

Lord Chancellor. The grantee of the rent-charge may distrain in all or any part of the lands for her rent, and there is no reason to abridge her remedy in equity; and the husband certainly intended her some benefit by this devise, and he has not declared it should be accepted in part of the rent-charge; and therefore dismissed the bill. (1)

(1) Reg. Lib. 1685. A. fol. 201. Vide Roll. Ab. 236, (c) pl. 5. Co. Litt. 147 b. 148 a. 150 b. *Ards* v. *Watkin*, Cro. Eliz. 637.

Case 343. WHITMORE *versus* WELD & Al'.

Eodem die. In Court. Ante Case 323.

Upon the *Lord Chancellor's* coming to the seal the plaintiff obtained an order to have this cause heard before his lordship, and not to stay for the Judges certificate; and this day coming on to be heard accordingly, the *Lord Chancellor* was of opinion, that the devise to the *Lord Craven* during the minority of the testator's son upon the whole complexion of the will should determine, when the son attained *seventeen* years of age; (1) and 2*dly*, had that been otherwise, yet it was a trust vested in the son, and the remainder over was void; (2) and therefore decreed for the plaintiff, and said, if the matter in question had been but for 100*l.* it would not have held an hour's debate. (3)

(1) The testator appointed his only son executor of his will, and he nominated the *Earl of Craven* executor during the minority of his said only son, but the will is not stated at length in the Register's Book.

(2) The words of the devise are as follow: "The surplus of my personal "estate, my debts, legacies, and fu- "neral charges satisfied, I give to the "Right Hon. *Wm. Earl of Craven*, for "the use of my only son, *William* "*Whitmore*, and his heirs lawfully "descended from his body, and in "case that my said only son *William* "*Whitmore* should decease in his mi- "nority without having issue lawfully "descended from his body, then for "the use of the issue male, &c. of my "sister, &c." It is the general rule that where a chattel interest comes to one who would be tenant in tail, had it been the case of land, the limitations over are void, *Trafford* v. *Trafford*, 3 Atk. 347. *Foley* v. *Burnell*, 1 Br. Ch. Rep. 285. Et vide Co. Litt. 20 a. and Mr. Hargrave's note (120).

(3) Reg. Lib. 1685. B. fol. 106.

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Case 344. REDMAN *versus* REDMAN.

9 *Decembris. In Court. Lord Chancellor.*

Upon a treaty of marriage between *A.* and the daughter of *B.*, *B.* would not consent to the marriage, for that *A.* owed 200*l.* to *I. S.*, to remove which objection, the brother of *A.* proposes to get up *A.*'s bond and to give his own in the room of it. But privately *A.* gives a counter-bond to his brother, and the daughter of *B.* is privy to this and encouraged it.—*A.* dies, his wife takes administration. The wife shall avoid this counter-bond, though party to the fraud. Also *A.* himself might have been relieved against this counter-bond. (1)

The case was, that upon a treaty for a marriage between *Charles Redman* and the now plaintiff, the plaintiff's father would not consent to the match, by reason that *Charles*

(1) *Gale* v. *Lindo*, post 475. *Turton* v. *Benson*, post 2 vol. 764. Pre. Ch. 522. 1 P. Wms. 496. S. C. *Lamlee* v. *Hanman* & *Ux.* post 2 vol. 466. 499.

Redman was indebted in the sum of 200*l.* to one *Bryan*, for which he and *Joice* his mother stood bound in a bond: to remove this obstruction, *Henry Redman* (younger brother of *Charles*) and *Joice* the mother give a new bond to *Bryan* for the payment of this debt; and thereupon the bond wherein *Charles* was bound was delivered up to be cancelled: but *Charles* gives his brother *Henry* a counter-bond to indemnify him against this debt, and paid the interest of the 200*l.* to *Bryan* during his life; and it was in proof in this cause, that the now plaintiff, the widow of *Charles*, was privy to all this matter, and that she being in love with *Charles* contrived this way to satisfy her father, that the marriage might take effect; but now being sued by *Henry* on the counter-bond, as administratrix to her husband, she brought her bill to be relieved.

The defendant's counsel insisted, that *Henry* became bound in this bond voluntarily, having no manner of obligation on him to pay this debt for his elder brother, but it was done at the instance and request of his brother and the now plaintiff, who contrived this means to bring the match about; and insisted that if *Charles* himself had been plaintiff, he should not have been relieved against this counter-bond: and his administratrix, who was privy to this transaction, could have no better right than *Charles* had.

Lord Chancellor. This is a plain fraud, and by this contrivance the father of the plaintiff was drawn in to give the greater portion; and he absolutely refused to marry his daughter, until *Charles* was made a clear man, and particularly discharged of this very debt; and though *Henry* had no obligation on him to become bound for his elder brother's debt, yet it was all one to the plaintiff's father which way that debt became discharged; but that was to be first done, let it be one way or other: and declared, that in case *Charles* himself had been the plaintiff he should have been relieved; but the case was stronger, because if this bond should be suffered to lie on *Charles's* estate, it might swallow the as-

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Roberts v. *Roberts*, 3 P. Wms. 66, and cases cited in not. there, where the principal on which the court proceeds in such cases is fully laid down. [See also *Scott* v. *Scott*, 1 Cox, 366. *Thompson* v. *Harrison*, 1 Cox, 344. *Palmer* v. *Neave*, 11 Ves. 165.] So it is declared to be a rule in equity, that where bond is given to return or refund any part of the portion without the father's privity it is void, *Kemp* v. *Coleman*, 1 Salk. 156. *Quære*, Could equity do more than relieve against it? *Duke of Hamilton* v. Lord *Mohun*, ibid. 158.

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sets, and defraud his creditors; as it also injured the plaintiff in the right she had by the custom of *London* to the personal estate of her husband; and therefore decreed the bond to be delivered up. (1)

(1) Reg. Lib. 1685. B. fol. 90.

Case 345.

HALE *versus* THOMAS.

18 *Decembris. In Court.*

2 Ch. Ca. 182. 186.

In 1638, those, under whom the defendant now claims a debt of 1,300*l.* principal money then lent, acknowledged a judgment for 2,000*l.* penalty, defeasanced for the payment of the principal moneys with interest. The defendant for *ten* or *twelve* years together had kept the plaintiff out of his debt, by fencing with prior incumbrances, which were in truth satisfied, and by setting up a pretended entail, which on a trial at law was found against him. The plaintiff had exhibited a former bill, and thereby only prayed, that the defendant might come to an account and accept what, if any thing, should be found to be due to him on those prior incumbrances, and that the plaintiff might be let into a satisfaction of his debt; but did not pray further, as he might have done, that if the defendant should be found to have raised or received more than was due to him, that he might pay over the surplus to the plaintiff; and upon the account taken in the said cause it was found, that the defendant was over-paid with a surplus of 4,000*l.*

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The plaintiff's now bill was, that he might have those moneys towards his debt, and be satisfied his principal moneys with interest and costs; and the matter came on now to be argued on the defendant's plea, who had pleaded the former bill brought by the plaintiff, and the proceedings thereon, and that after the account taken in the former cause, the plaintiff had proceeded at law, and revived his judgment by *scire fac.* and taken execution by *elegit*, and that thereupon the defendant had brought the whole penalty of the bond into the Court of *Common Pleas*, and insisted that a court of equity ought not to charge him beyond the penalty of the judgment; and this plea was allowed by the court. Not but that equity may, and in many cases doth,

Equity in some cases carries the debt beyond the penalty; as when a debt is due to a person, and he is kept out of it by an injunction.—But a plaintiff in equity cannot charge the defendant beyond the penalty any more than he can at law.

carry on the debt beyond the penalty of the security, as where the party hath been delayed by injunction of this court, and the like; but it was observed, that where it has been so done, it has been always against a plaintiff, when he hath come for relief: but there is no precedent where a plaintiff in this court shall charge a defendant beyond the penalty, and further than he could charge him at law: (1) but in this case the court allowed the plea, principally because the plaintiff after the account taken in the former cause had surceased his prosecution in this court, and proceeded at law, having sued forth a *scire fac.* on his judgment, and taken forth execution, and therefore having elected to proceed at law, he should not now resort back to equity; especially as this case is, where he hath taken execution by *elegit*, which charged a moiety of the lands only, and now would come for a decree in equity for the same debt, which would charge the person and the whole estate, and therefore the court allowed the plea.

Note.—In this case the plaintiff thought it most for his advantage to prosecute at law, expecting to have held the

(1) The general rule seems to have long been that the debt shall not be carried beyond the penalty, *Steward* v. *Rumball*, post 2 vol. 509. Sed quære by reporter there. Eq. Ca. Ab. 92, pl. 7. ibid. 288. (c) pl. 1. and note. *Ellis* v. *Whinnery*, 2 Bro. P. C. 159. *Tall* v. *Ryland*, 1 Ch. Ca. 183. *Friend* v. *Burgh*, Ca. Temp. Finch. 487. which book, however, is said to be of no authority, *Harvey* v. *Aston*, 1 Atk. 372. Et vide stat. 4 Anne, c. 16. for relief of debts at law in such cases. *Bidlake* v. *Arundel*, 1 Ch. Rep. 95. *Davis* v. *Curtis*, 1 Ch. Ca. 226. *Anon.* 1 Salk. 154. *Galway Corporation* v. *Russell*, 2 Bro. P. C. 275. *Bromley* v. *Goodere*, 1 Atk. 75, 80. *Tew* v. *Earl of Winterton*, 3 Bro. Ch. Rep. 489. *Knight* v. *Maclean*, ibid. 496. *Lloyd* v. *Hatchet*, 2 Anst. 525. *Sharpe* v. *Earl of Scarborough*, 3 Ves. 557. *Mackworth* v. *Thomas*, 5 Ves. 329. *Wilde* v. *Clarkson*, 6 Term Rep. 303. So where account taken before the Master, where interest exceeds the penalty, the Master reports the penalty only allowed as due, *Grosvenor* v. *Cook*, Dick. 305. *Gibson* v. *Egerton*, ibid. 408. *Kettleby* v. *Kettleby*, ibid. 514. But equity will nevertheless, under circumstances, carry the debt beyond the penalty, as where a man is kept out of his money by an injunction, or is prevented from going on at law, *Duval* v. *Terry*, Show. P. C. 15. *Hale* v. *Thomas*, sup. So where an advantage is made of money, interest shall be carried beyond the penalty, *Lord Dunsany* v. *Plunkett*, 2 Bro. P. C. 251. So where a boud is only taken as a collateral security, *Kirwane* v. *Blake*, 2 Bro. P. C. 333. Or where the recovery of the debt is delayed by the obligor, *Pulteney* v. *Warren*, 6 Ves. 92. Et vide *Clarke* v. *Seton*, ibid. 411. and cases cited there, from which it appears, 1*st*. That at law as well as in equity in the case of a bond the penalty is considered as the debt. 2*dly*. That under circumstances equity will carry the debt beyond the penalty; and 3*dly*. That a clear distinction is taken at law where action brought upon a bond, and where upon a judgment, as to the recovery beyond the penalty. [See as to the last point, *Maclure* v. *Dunkin*, 1 East, 436.]

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lands at the extended value, and if the defendant had come for relief in equity he should not have redeemed or charged the plaintiff with the real value, unless the defendant would have offered to pay the whole principal moneys with interest and costs. But as soon as the plaintiff had extended at law, Mr. *Serjeant Maynard*, the defendant's counsel, advised him to bring a *scire fac.* against the plaintiff to shew cause why the extent should not be taken off on payment of the penalty of the judgment, which he at the same time offered to pay, and brought it into the court of *Common Pleas.* (1)

(1) There is simply an entry of a demurrer allowed in a case of the above name. 18th Dec. Reg. Lib. 1685. A. fol. 121.

Case 346.

Eodem die.

In Court.

Lord Chancellor.

NOSWORTHY *versus* BASSET.

1 Show. 537. Salk. 592. S. C.

THE plaintiff having filed a special replication, the defendant put in a plea and demurrer to the replication; his plea was, that since his answer put in, he had recovered the estate in question in an ejectment upon full evidence at a trial at the bar; and demurred to other special parts of the replication.

Whether after a plea or demurrer to a special replication allowed, the plaintiff may be admitted to put in a general replication.

The plaintiff's counsel admitted the plea and demurrer to be good, which were therefore allowed by the court; (1) but the court refused to declare any opinion, whether the plaintiff might not, notwithstanding the plea and demurrer were allowed, afterwards put in a general replication: and the plaintiff's counsel conceived they might, because the plea and demurrer were tied up to that replication only; but seemed to admit, that it might have been so pleaded, as that the matter settled by the trial at law should not have been drawn into issue or examined into. (2)

(1) Reg. Lib. 1685. B. fol. 175.

(2) This question is not mentioned in the Register's Book, but special replications, with all their consequences, are now out of use, vide Mitf. Treat. 259. (3d. Edit.)

ANONIMOUS.

Case 347.

Eq. Ca. Ab. 2, pl. 6. 80. (1) pl. 1.

In a bill of interpleader, a trial at law is directed between the defendants. The suit is thereby ended as to the plaintiff, so that if the plaintiff dies, defendants may proceed without reviving the cause.

Upon a motion it was declared by the court that a cause having been heard upon a bill of interpleader, and a trial at law directed to settle the right between the defendants, there is an end of the suit as to the * plaintiff; so that if he afterwards dies, the cause shall still proceed, and there needs no revivor, each defendant being in the nature of a plaintiff.

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ODDY *versus* TORLESSE.

Case 348.

Lord Chancellor.

The plaintiff having agreed with the defendant for the office of clerk of the *Bridge-house* for 950*l.* deposited 500*l.* in money; and a bond of 900*l.* penalty was entered into by himself, with a sufficient surety for 450*l.* more, which was to be delivered to the defendant upon his surrender of his office to the plaintiff; (1) the plaintiff was admitted, and the defendant received the 500*l.* and the bond, and afterwards came to an agreement with the plaintiff, that the plaintiff should pay him 80*l.* yearly until the 450*l.* was paid off. (2)

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(1) In consideration of the said sum of 500*l.* and bond for 450*l.* deposited with one *Wilkinson*, it was agreed that defendant should, before the end of the same July surrender his office, to the intent that the plaintiff might, at his own costs, be admitted thereto, and that the defendant should, on his surrender, receive the bond, and 500*l.* from *Wilkinson*.

(2) The second agreement, between the plaintiff and defendant, was in writing, and dated the 17th July, 1677, the effect whereof was, that the plaintiff should pay the defendant 35*l.* on the 20th day of January following, and 80*l.* a-year from that time by half-yearly payments, out of the profits of the office, for so long time as the said 450*l.* should continue unpaid, and until payment thereof, the defendant assigning as a reason for such agreement, that he gave up the office without receiving all the money at the time. The plaintiff had been sued by the said defendant at law, who had obtained several judgments against him, and there are divers payments stated to have been made by the plaintiff to the defendant, and costs incurred at law, the result of which was as the defendant computed, an arrear due to him from the plaintiff of 219*l.* together with interest, and charges; plaintiff paid 110*l.* into court on an injunction being granted; judgment had been obtained on the first

ODDY v. TORLESSE.

The plaintiff had paid him on that account so much as exceeded the 450*l.* and interest by 300*l.*

The plaintiff's bill was therefore to have the articles for payment of the 450*l.* and 80*l. per ann.* in the mean time, and a judgment on a bond for performance of covenants, delivered up, and the surplus of the money repaid with interest.

The defendant insisted that it having been tried in the *Common Pleas*, whether the contract was usurious, by rule of that court, and there found not to be usurious, and there being still a great deal of money due to him on that account, the plaintiff ought not to be relieved without payment of it: but it appearing to the court that the first agreement which was made with the plaintiff's friends' privity was for 950*l.* and that they were not privy to the second agreement; but the plaintiff's necessity was worked upon therein; for that, as it was penned, the plaintiff was to pay 80*l. per ann.* till the 450*l.* and every part of it was paid, so that if there were
[353] but 5*l.* of it unpaid, yet the plaintiff must pay 80*l. per ann.* till it was paid; the *Lord Chancellor* declared, that if the plaintiff had paid beyond 950*l.* and interest, he should pay no more; but for what was actually over-paid he would not relieve him: but decreed, that what money had been brought into court by the plaintiff to continue the injunction should be delivered out of court to him, and that the defendant should acknowledge satisfaction on the judgment, and deliver up the articles and bonds. (1)

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bond, after a plea of usury. The bill suggested the written agreement to have been unduly obtained, but denied by answer. Evidence was read on the hearing, and then the decree as above. Reg. Lib.

(1) Reg. Lib. 1685. B. fol. 27. But where the whole of the transaction was originally a fraud, money paid will be decreed back with interest, and costs, *Colt* v. *Woollaston*, 2 P. Wms. 153. *Spackman* v. *Woollaston*, ibid.

Case 349. *January*, 1685. *Lord Chancellor.*

JOHN KEW *versus* ROUSE and his Wife.

THE plaintiff's wife, whose administrator he is, and the defendant's wife were the two daughters of *Elizabeth Wise*, who being possessed of a term for years, in *April*, 1679, devised that term and all her interest therein unto her two daughters, they paying yearly to her son 25*l.* by quarterly

Eq. Ca. Ab. 292, pl. 7. S. C. A devise of a term to *A.* and *B.* paying 25*l.* a-year out of the rents to one during his life, *viz.* 12*l.* 10*s.* by each of them, is a tenancy in common.

payments, *viz.* each of them 12*l.* 10*s.* yearly out of the rents of the premises during his life, if the term so long continued. The plaintiff's wife being dead, the defendant claims the whole by survivorship; and whether it was a joint tenancy or a tenancy in common was the question.

The *Lord Chancellor* conceived it clearly to be a tenancy in common; for that 25*l. per ann.* was to be paid by the two daughters equally in moieties; and decreed an account of the moiety of the profits to the plaintiff, as administrator to his wife. (1)

(1) Reg. Lib. 1685. A. fol. 435. The decision in this case seems to go upon the ground, that if the term had been expressly given to the two daughters, equally to be divided between them, there would have been no doubt but that it would have been a tenancy in common. This does not, however, appear to have been considered as a settled doctrine in all cases, long after that time, as in the case of a surrender of copyholds, *Fisher* v. *Wigg*, 1 P. Wms. 14. As to the authority of *Fisher* v. *Wigg*, vide *Rigden* v. *Vallier*, 2 Vez. 255. And in the case of a term assigned, *Hamell* v. *Hurst*, Pre. Ch. 164. though decided to be a tenancy in common. And in the case of a grant or deed, *Ward* v. *Everard*, Salk. 390. And where a devise to two *equally to be divided*, and *to the survivor of them*, it was held a joint-tenancy, *Clerk* v. *Clerk*, post 2 vol. 323, on the ground that the latter words controuled the former. Et vide *Barker* v. *Giles*, 2 P. Wms. 282, and cases cited there. But the courts afterwards began to lean more strongly against a joint tenancy, *Edwards* v. *Fashion*, Pre. Ch. 332. *Hall* v. *Digby*, 4 Bro. P. C 224. *Haws* v. *Haws*, 1 Vez. 13. 1 Wils. 165. 3 Atk. 523. S. C., where the words of the devise were, "equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants *with the benefit of survivorship*," held a tenancy in common with a limited benefit of survivorship. *Gaskin* v. *Gaskin*, Cowp. 660. *Roebuck* v. *Dean*, 2 Ves. jun. 265. *Jolliffe* v. *East*, 3 Br. Ch. Rep. 25. *Martin* v. *Wilson*, ibid. 324. *Butler* v. *Stratton*, ibid. 366. *Bolger* v. *Mackell*, 5 Ves. 509. But though the words "equally to be divided," "share and share alike," &c. are in general construed to create a tenancy in common, yet it is not by force of the words merely, but because it appears to be the intention of the party that there should be no survivorship, *Furse* v. *Weeks*, 2 Rol. Ab. 90. *Blisset* v. *Cranwell*, Salk. 227, 392. *Rigden* v. *Vallier*, 2 Vez. 258. So where the context shews a joint tenancy to be intended, or where there is an express joint tenancy, the words shall be construed accordingly, *Ettricke* v. *Ettricke*, Amb. 656. *Armstrong* v. *Eldridge*, 3 Bro. Ch. Rep. 215. And where a devise was to *A.* and her issue, and no word of severance, or any thing to shew that severance was meant, held a joint tenancy, *Davenport* v. *Hanbury*, 3 Ves. 257. So *Morley* v. *Bird*, ibid. 628, 31. *Stewart* v. *Bruce*, ibid. 632. *Campbell* v *Campbell*, 4 Bro. Ch. Rep. 15, where held that two-thirds of a residue being given *to and amongst* the children of *A.* they took as tenants in common, but the remaining third being given *to* (without the word *amongst*) the children of *B.* they took as joint tenants. So the intention to sever when there are words of joint-tenancy must clearly appear, *Whitmore* v. *Trelawney*, 6 Ves. 134. But the words of survivorship in a will shall, if possible, be so construed as not to destroy or defeat a tenancy in common, *Russell* v. *Long*, 4 Ves. 551. As to the operation of the words "equally to be divided," &c. in deeds under the statute of uses, and in common law con-

veyances, vide cases cited by Mr. Cox in note (1) to *Fisher* v. *Wigg*, ub. sup. As to devise to residuary legatees not being executors, vide *Perkins* v. *Baynton*, 1 Bro. Ch. Rep. 118. *Jolliffe* v. *East*, 3 Bro. Ch. Rep. 26, and cases cited there. And as to the operation of those words in the case of an estate for life, vide *Philips* v. *Philips*, 1 P. Wms. 33. As to the doubt formerly entertained whether joint-tenancy of a legacy, vide *Cray* v. *Willis*, 2 P. Wms. 529, 533, and cases cited in note there, *Morley* v. *Bird*, 3 Ves. 628. which exploded the notion that in cases of legacy courts of equity should judge according to the rules of the civil law, which are against survivorship. [So *Crooke* v. *De Vandes*, 9 Ves. 197. *Swaine* v. *Burton*, 15 Ves. 365.] As to the words "if any of them (the legatees) "die then to the survivor," it was decided that they should not create a joint-tenancy, as they shall be construed to mean, if any of them should die in the lifetime of the testator, *Lord Bindon* v. *Earl of Suffolk*, 1 P. Wms. 96, and cases cited in note there. And though that decree was reversed in the House of Lords, yet some of the later cases have since construed the words so as to favour a tenancy in common, by confining them to the death of the testator, *Stringer* v. *Phillips*, Eq. Ca. Ab. 291, pl. 4, in note, and cited by Mr. Cox not. to *Lord Bindon* v. *Earl of Suffolk*, ub. sup. *Stones* v. *Heurtley*, 1 Vez. 165. *Roebuck* v. *Dean*, 2 Ves. jun. 265. *Perry* v. *Woods*, 3 Ves. 204. *Maberly* v. *Strode*, ibid. 450. Sed vide against that construction, if any other can be adopted, the observation of *Arden*, Master of the Rolls, in *Russell* v. *Long*, 4 Ves. 555, and of Sir *Wm. Grant*, Master of the Rolls, in *Brown* v. *Bigg*, 7 Ves. 286: but which, nevertheless, do not seem to militate against the rule that in the construction of those words, a tenancy in common shall, as much as possible, be favoured. Et vide *Jackson* v. *Jackson*, ibid. 535, at the Rolls, the decree in which was varied on appeal, 9 Ves. 591. The point, however, on which that variation was made, was as to the law of merchants, (part of the legacy being embarked in trade) operating, under certain transactions, a presumption that there should be a severance.

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DE

TERMINO S. HILLARII,

1 & 2 *Jac. II.* 1685.

IN CURIA CANCELLARIÆ.

Case 350.

16 *January.*

In Court. Lord Chancellor.

Eq. Ca. Ab. 234, pl. 6. 333, pl. 2. S. C.

BECHINALL *versus* ARNOLD.

Devisee shall not examine witnesses in *perpetuam rei memoriam* to prove a will against a purchaser without notice, till the will has been established by a verdict at law.

BILL to prove a will and perpetuate the testimony of the witnesses. The defendant pleaded himself a purchaser without notice of any such will, and insisted, that unless there

had been a verdict in affirmance of such will, (nothing hindering the plaintiff, but that if he had a title he might recover at law) the plaintiff ought not to be admitted to examine his witnesses, thereby to hang a cloud over a purchaser's estate; and upon debate the court allowed the plea. (1)

BECHINALL v. ARNOLD.

(1) So demurrer allowed on the same ground, *Parry* v. *Rogers*, post 441. Secus ruled on demurrer, plaintiff being in possession, though his right not established at law, *Duke of Dorset* v. *Girdler*, Pre. Ch. 531. But a slight interest will sustain such a bill, *Lord Dursley* v. *Fitzhardinge*, 6 Ves. 251, in which the learning, and the cases on this subject are very fully stated and discussed. [See also note (z) to *Philips* v. *Carew*, 1 P. Wms. 117. 6th edit.]

FODEN *versus* HOWLETT.

Case 351.

Eodem die.

In Court. Lord Chancellor.

LORD CHANCELLOR. If the daughter of a citizen of *London* marries in his life-time against his consent, unless the father be reconciled to her before his death, she shall not have her orphanage share of his personal estate; and it would be unreasonable to take the custom to be otherwise. (1)

Eq. Ca. Ab. 156, pl. 12. S. C.

A daughter of a freeman marrying without her father's consent loses her orphanage part, unless he is reconciled to her before his death.

(1) Vide *Harvey* v. *Aston*, 1 Atk. 361. Comyn. 749. S. C.

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WALL & Ux. *versus* THURBORNE & Ux. and ISABELLA CROOKE.

Case 352.

Eodem die.

In Court. Lord Chancellor.

SIR *George Crooke* having three daughters only, by his will directs, that his lands shall descend and come amongst his daughters, in such shares and proportions as his wife by deed in writing should direct and appoint. The wife makes an unequal distribution, and having given little to the plaintiff, she brought her bill, and insisted, that the giving the wife such power by the will was intended only to keep her chil-

A. directs his lands shall descend to his three daughters, in such shares and proportions as his wife by deed shall appoint.

She makes a very unequal distribution. Whether equity will relieve against it.

WALL v. THURBORNE

dren in obedience; and the plaintiff having behaved herself dutifully, she ought to have an equal share.

To this the defendant pleaded the will, and that the wife, in pursuance of such power, had by deed executed, appointed so much to one daughter, and so much to the other; and though the deed was with power of revocation, yet it was never actually revoked.

A person having only an authority cannot annex a power of revocation, when he executes it.

As to the power of revocation, the case may be eased of that, for it was only an authority in the wife, and that being once executed, she could not reserve such power to herself. And as to the main point, whether the wife might make such an unequal distribution or not, the court would not now determine upon the plea, but ordered it should stand for an answer, with liberty to except: but declared the circumstances must be very strong, as something of bribery or corruption, that would take away this power that was given to the wife by the express words of the will.

For the plaintiff was cited the case of *Cragrave* and *Perrost*, (1) where a man having two daughters, one by a former wife, and another by his second wife, devised his estate to his wife to be distributed between his daughters, as his wife should think fit: and she gave *one thousand pounds* to her own daughter, and but 100*l.* to the other; and the court there decreed an equal distribution.

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On the other side was cited the case of *Swetnam* and *Woolaston*, where an estate was devised to a man to distribute the same amongst his nephews and nieces, as he should think fit: and one of the nieces, to whom nothing had been appointed, brought a bill that she might have an equal share of the estate, and was dismissed. (2)

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(1) *Craker* v. *Parrott*, 2 Ch. Ca. 228. S. C. called *Oaker* v. *Parrot*, Finch. 354. Eq. Ca. Ab. 345, pl. 12.

(2) Vide *Astry* v. *Astry*, Pre. Ch. 256. *Gibson and Ux.* v. *Kinven*, ante 66, and cases in not. there. *Menzey* v. *Walker*, Forr. 72. *Kemp* v. *Kemp*, 5 Ves. 858, for observation of *Arden*, Master of the Rolls on the principal case. Et vide post 414. S. C.

LADY BODMIN *versus* VANDEBENDY.

Case 353.
27 *January.*
In Court.
Lord Chancellor.

Eq. Ca. Ab. 219, pl. 3.
Pre. Ch. 65.
2 Ch. Ca. 175.
Show. P. C. 69.
S. C.

A term kept on foot to protect a purchase. If equity will remove it in favour of a dowress, who has recovered at law. *Ante Case* 171.

THE defendant for 4,400*l.* purchased of the *Lord Bodmin* the reversion (after the death of the *Lord Warwick*) of lands of near 1,000*l. per ann.* and for protection of the estate, and to prevent the plaintiff's dower, the defendant upon his purchase took an assignment of a term for years, which was vested in trustees to secure the payment of certain annuities, and afterwards in trust to attend the inheritance; and likewise took an assignment of an ancient statute, that had been kept on foot for the protection of the estate.

The plaintiff had recovered dower at law, but was prevented from taking out execution by reason of this term and statute; to be relieved against which, and to be let into possession of her thirds, was the end of the plaintiff's bill.

The defendant insisted he was a purchaser, and that he ought to have the benefit of this term and statute for the protection of his purchase.

For the plaintiff it was insisted, that *æquitas sequitur legem*, and that dower in the eye of the law was as much favoured as a purchaser; and therefore where a tenant in tail dies without issue, whereby the estate, which was in the husband, is determined, yet the dower continues; and that a woman for her dower comes not in the *post*, as has been objected, but it is a continuance of the husband's estate: (1) and though a difference has obtained and been allowed betwixt a jointress that comes in by the act of the party, and a woman that by operation of law becomes entitled to dower: and that the former shall have the benefit of a term limited to attend the inheritance, and not the latter, yet in truth there was no ground in reason for such a difference; for though a jointure may be made in respect of a portion, yet marriage itself is a sufficient consideration, and so esteemed in law; *et fortior & æquior est dispositio legis quam hominis.*

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2ndly. The original intent in creating this term was only to secure the payment of annuities, and that particular in-

(1) Vide Co. Litt. 241 a.

BODMIN v. VANDEBENDY.

tent being satisfied, this term ought not to be longer kept on foot; and this reason was enforced from the judgment given in the cause between *Hall* and *Dench*, (1) where a man having by his will devised his lands in fee to *I. S.* and afterwards having occasion for moneys mortgages the same lands in fee to *I. N.* it was decreed that this mortgage was not an absolute revocation; but that the devisee should have the benefit of redemption, the mortgage being only for that particular purpose to supply the mortgagor's present occasions with moneys. (2) And so in this case, the particular ends in raising this term being answered, it ought not to be made use of to keep the plaintiff out of her dower: and they cited the case of the *Attorney-General* and *Thruxton*, (3) where it was adjudged, that the inheritance escheating, though the King by escheat comes in the *post*, yet he should have the benefit of a term limited to attend the inheritance; (4) and urged that in case there was a term raised of lands in *gavel-kind* to attend the inheritance, that equity would distribute this term amongst all the heirs in *gavel-kind, pro rata*; and it was further urged, that the circumstances of this case were of great weight in equity; the defendant was a purchaser, with notice of the plaintiff's title to dower, and that he took advantage of the Lord *Bodmin's* extravagance, and that the value in respect of the consideration paid was in itself very exorbitant, *viz.* the reversion of 1,000*l.* *per ann.* after the death of the Lord *Warwick*, who died within a year after the purchase, for 4,400*l.* so that it might be reasonably presumed, that the defendant had an allowance made him in his purchase in respect of the plaintiff's title to dower; and it is a common case in equity, that where a purchaser has an allowance in respect of an incumbrance, this shall make the incumbrance good, though it was before defective; and the Lady *Bodmin* here brought a great portion, at least 30,000*l.* and these circumstances make this case much different from that of *Pheasant* and *Pheasant*, for there the plaintiff had by the decree of this court her whole portion restored to her, it having been lodged in the Chamber of *London*, and the pro-

Where lands escheat to the King, he shall have the benefit of a term to attend the inheritance.

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2 Ch. Rep. 131, 2.

2 Vent. 340. S.C.

(1) Ante p. 329, 342.

(2) Vide *Baden* v. *Lord Pembroke*, post 2 vol. 52.

(3) Ante p. 340.

(4) It is there said the King is not in barely in the *post*, but in the *per* also, by reason that the term went with the inheritance, by the express limitation of the party. So where a term is attendant on the inheritance, if the King extends the inheritance, he shall have a right to the term, *Nicholls* v. *How & Al*, post 2 vol. 390. *Burgess* v. *Wheate*, 1 Bl. 123, not held to be law, sic dict. arg. *Walker* v. *Denne*, 2 Ves. jun. 174.

perty not altered by her husband: and there was therefore the less reason to incline a court of equity to relieve her against the term that prevented her dower; and in that case she had not actually recovered dower, as the plaintiff here has done.

For the defendant it was insisted, that this was a case that must frequently happen, and yet there was no precedent where a plaintiff had been relieved in such a case; but on the contrary the case of *Pheasant* and *Pheasant* was express in point, and adjudged that the plaintiff should not be relieved: and as to the circumstances of a great portion brought by the plaintiff, and that the defendant had purchased at an under-value, by which they would difference this case from that, it was answered, that those were bare suggestions, and not a word proved of it in the cause, and therefore not to be regarded. But what was chiefly relied on by the defendant's counsel, was the inconvenience that might ensue, should relief be given in this case: that it would alter the course of conveyancing, and overthrow many purchases, it having always been looked upon as a good security to a purchaser, and a sufficient protection to his estate, where there was an ancient term kept on foot; and frequently in such cases to avoid charges they never insist on a fine or common recovery: and if such a term shall be set aside for a dowress, why not for any other incumbrance?

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The Court inclined to relieve the plaintiff, and therefore in regard the equitable circumstances of a great portion and the purchase at an under-value were not in proof, the *Lord Chancellor* referred it to a Master to examine, and to state the case to the court. (1)

Note.—The plaintiff's bill was afterwards dismissed, and upon an appeal to the House of *Lords* the decree of dismission was affirmed. *Vide Cases in Parliament*, fo. 69.

(1) Vide *Swannock* v. *Lifford*, Amb. 6, and 2 Atk. 208. S. C. under the name of *Hill* v. *Adams*, and Mr. *Butler's* note, Co. Litt. 208 a. note (1). for a very full note of *Lord Hardwicke's* judgment in that case. And it is now clear that a purchaser or a mortgagee (who is a purchaser *pro tanto*) though he knows of the right of dower, may advance his money, and taking in an outstanding term, may avail himself of it, though the consequence will be utterly defeating the right of dower, sic dict. per *Master of the Rolls*, *Wynn* v. *Williams*, 5 Ves. 134. [See also *Maundrell* v. *Maundrell*, 7 Ves. 567. 10 Ves. 246. *Mole* v. *Smith*, Jacob, 497.]

Case 354.

3 *Februarii. At the Rolls.*

Eq. Ca. Ab. 32, pl. 3. 75, pl. 3. 364, pl. 4.

Bill in equity lies for recovering ancient quit-rents, though very small, as 2*s.* or 3*s. per ann.* and if proved to be constantly paid, the court will decree payment, or will direct an issue to try whether any, and what rent is issuing out of all or any of the lands in the bill.

COCKS *versus* FOLEY.

THE bill was to be relieved touching two several rents purchased by the plaintiff of 3*s.* and 2*s. per annum*, issuing out of lands, the bill suggesting the rents had been constantly paid time out of mind, but that they could not recover at law, not knowing the nature of the rent, whether *rent-charge*, *service*, or *rent-seck*, and the boundaries of the land being uncertain; so that they could not at law declare with that preciseness as was required in an avowry: and several precedents being produced, where the Court had relieved in these cases, and, amongst others, Sir *William Beversham's* case, who had a decree for a rent of 1*s.* 3*d. per annum*, the Court declared they would decree the rent, if it had been constantly paid; but the defendant desiring the matter might be tried at law, an issue was directed to try whether any and what rent was issuing out of all or any the lands in the bill mentioned. (1)

(1) The rents appear to have been 2*s.* and 1*s.* Reg. Lib. 1685. A. fol. 295. Vide *Steward* v. *Bridger*, post 2 vol. 516., where court decreed payment of arrears of growing rent, though alleged only that payment had been made for near 20 years, and denied trial at law, though prayed by defendant, *Palmer* v. *Wettenhall*, 1 Ch. Ca. 184. Vide *North* v. *Earl and Countess of Strafford*, 3 P. Wms. 148. *Benson* v. *Baldwin*, 1 Atk. 598., and cases cited in not. there. *Quære* as to the bill for arrears of rent-charge, where power of distress reserved, and no fraud proved. Vide *Champernoon* v. *Gubbs & Al'*, post 2 vol. 382. Pre. Ch. 126. S. C. So bill dismissed, *Foster* v. *Foster*, post 2 vol. 386.

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Case 355.

February, 1685. *Sir John Trevor, Master of the Rolls.*

USHER & PRIME *versus* AYLEWARD, EDMONDS, & Al'.

IN 1669, *Bromwell* and *Webb* took two building leases of tofts of ground in *London*, one from the trustees of St. *Bartholomew's* Hospital, which was taken in *Kemson's* name, and the other from the trustees of the parish of St. *Michael, Cornhill*, in *Parsons's* name, upon which *Webb* and *Bromwell* built several houses, and therein *Bromwell* disbursed considerably more than *Webb*. In 1675, by indenture between *Kemson*, *Webb*, and *Bromwell*, wherein reciting that

Kemson's name was used in the lease from St. *Bartholomew's* Hospital in trust for *Webb* and *Bromwell*, their executors, &c. and that the tofts were the proper purchase of *Webb* and *Bromwell*, and the houses thereon were built at their charges, *Kemson* for 5*s.* assigns that lease to *Webb* and *Bromwell*, *habend'* to them, their executors, &c. and they covenant to save *Kemson* harmless from the rent therein reserved. The 23d *June*, 1669, *Parsons* assigns his lease to them likewise.

Webb and *Bromwell* received the rents and profits during their joint lives; and in *June*, 1678, *Bromwell* died, and made his wife executrix, who proved the will. One *Hyban* upon a *testat' fier' fac.* to the sheriff of *Middlesex*, seized the houses in question, which (19 *February*, 1679) were sold by the sheriff to *Hyban*; and *Hyban* and *Bromwell's* executrix, for 240*l.* paid by plaintiff *Usher*, assigned all their interest in law or equity to the plaintiff *Prime* in trust for *Usher*.

Ten days after *Bromwell's* death, *Webb* assigned St. *Bartholomew's* lease to *Francis Edmonds* for 800*l.* debt, which *Webb* owed him: afterwards *Edmonds* died, and the defendant *Edmonds* took administration to him: *Webb* became a bankrupt in *July*, 1679, and the commissioners the [361] 3d of *December*, 1679, reciting *Kemson's* lease and *Bromwell's* death, and that the right survived to *Webb*, assigned that lease to the defendant *Edmonds* for his share of his intestate's debt of 800*l.* owing by *Webb*; and *Edmonds* enjoyed till *Midsummer*, 1684.

The defendant *Ayleward* swore by his answer, that he went with one *Waile* (who deposed so also) to *Bromwell's* executrix, to know if she or any other claimed title to the premises, and whether there was any deed to prevent survivorship; who said she claimed nothing therein, and that he might safely proceed in the purchase; and thereupon (*June* 24, 1684) *Edmonds* for 410*l.* really paid by defendant *Ayleward*, assigned *Kemson's* lease to *Ayleward*; and *Ayleward* denied that he knew or heard of the plaintiff's title before his purchase; and *Ayleward* by his answer confessed the having of *Kemson's* assignment, and the declaration of trust put therein, and confessed that the lease to *Parsons* was not assigned to him by the commissioners, nor by *Edmonds*, by any express words; yet conceived it did pass; for that the buildings were intermixed upon both tofts

USHER v. AYLEWARD.

of ground, and that one could not be enjoyed without the other.

The plaintiff and defendant both of them proved their money paid; and the question in this case was, whether the plaintiff should be relieved against the title by survivorship?

If two joint purchasers pay an equal share of the purchase money, this makes them tenants in common in equity. (1)

For the plaintiff it was insisted, that survivorship was against equity, and that by the justice of this court, if two joint purchasers pay share and share alike for a purchase, and one dies, his representative shall be relieved against the survivor for a moiety of the purchase; and that in the present case there would be no doubt, but that if *Bromwell's* executor had sued *Webb* for a moiety, she must have been relieved against him, and so must the plaintiff also as her assignee; and that if there was an equity fixed upon the

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deeds by the assignment and declaration of *Kemson* between the joint tenants to prevent survivorship, as most certainly there was, the defendant's pretence of ignorance of the plaintiff's title would not justify his purchase against it; for that he purchasing under *Kemson's* assignment must be subject to that equity which did thereby arise against survivorship; and that he did apprehend there was such a title lying out, appears by his discourse with *Bromwell's* executrix: and therefore he should not have proceeded therein upon her saying she claimed no right, or that he might safely proceed; for that such discourse was after her assignment to the plaintiff, and so would not turn to his prejudice. Yet nevertheless the defendant being a purchaser, though under these circumstances, the *Master of the Rolls* dismissed the bill without costs; and the rather, for that the plaintiff did not bring the bill till after the defendant's purchase, though the plaintiff's purchase was made two years before. (2)

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(1) [Contra, *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 291. *Aveling* v. *Knipe*, 19 Ves. 441.]

(2) In the Register's Book it is simply stated that the bill was dismissed without costs. Reg. Lib. 1685. B. fol. 200.

JOHN HUCKSTEP *versus* DOROTHY MATHEWS and JOHN COURT.

Case 356.
February, 1685.
Lord Chancellor.

Eq. Ca. Ab. 213, pl. 7. S. C.

Devise of lands to trustees in fee in trust to pay debts and legacies, and after these paid then to sell; and if any of the testator's name would buy it, such person to have it for 200*l.* less than the value. One of the testator's name brings a bill for this pre-emption; but delays bringing it until twenty-five years after testator's death. Bill dismissed.

John Huckstep, (whose father and the plaintiff were brothers) in *December*, 1685, made *John Mathews* and *Benjamin Court* executors of his will, and gave them thereby the revenues of his lands till his debts and legacies were paid, and after payment thereof gave the lands to them and their heirs, upon condition that if any of the name of *Huckstep* would purchase them for his own use, then his will was that *Mathews* and *Court* should sell the same to him for 200*l.* less than the reasonable value thereof.

The executors proved the will, and enjoyed jointly for ten years, and then *Court* died, and *Mathews* received the whole rents, which with the personal estate were more than enough to pay the debts and legacies; and the plaintiff being of the name of *Huckstep* brought his bill, and prayed a conveyance of the lands for 200*l.* less than they were worth to be sold.

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The defendants demurred, for that the will was made above *twenty-five* years ago, and it was uncertain to whom the sale ought to be made, and *Mathews* and *Court* (who, if the same were to be sold, were to sell the same) are both dead; which demurrer being heard before the *Lord Keeper North*, he ordered the defendants should answer the bill, and saved the benefit of the demurrer to the hearing.

And now the cause came on before the *Lord Chancellor*, and the defendants by answer insisted that *Court* being dead, *Mathews* after his death had levied a fine of the premises, and made a settlement thereof, under which the defendants now claimed; and that there were above five years passed since that fine was levied before the plaintiff brought his bill, though the plaintiff lived always within a mile of the place, where the testator died. And the *Lord Chancellor* conceived, that the plaintiff's bill being brought *twenty-five* years after the testator's death, what was prayed thereby was unreasonable, and therefore dismissed the bill. (1)

(1) It is simply stated in the Register's Book that the bill was dismissed. Reg. Lib. 1685. A. fol. 601. So bill of review for error apparent will not lie after 20 years from making the decree, *Edwards* v. *Carrol*, 5 Bro. Par.

HUCKSTEP v. MATHEWS.

Suppose two persons named *Huckstep* had at the same time claimed the benefit of this devise, which should have it?

Ca. 466. *Smith* v. *Clay*, Amb. 645. So said the same doctrine will hold in the case of a bill of re-hearing, after 20 years, *Smith* v. *Clay*, ub. sup. So demurrer on the ground of length of time to a bill for redemption of mortgage may be good, sic dict. per *Master of the Rolls*, *Hardy* v. *Reeves*, 4 Ves. 479. [See also *Foster* v. *Hodgson*, 19 Ves. 180. *Hodle* v. *Healey*, 1 V. & B. 536. *Hovenden* v. *Annesley*, 2 Sch. & L. 636.] So bill for an account dismissed, on the ground of laches, though the length of time cannot be pleaded in bar, *Pearson* v. *Belcher*, 4 Ves. 627. So where bill filed 18 years after a suit compromised by plaintiff on the same subject, dismissed, *Yate* v. *Moseley*, 5 Ves. 480.

Case 357. 10 *February*. *Lord Chancellor*.

THOMAS BUTCHER *versus* STAPELY and RICHARD BUTCHER.

A parol-agreement for a purchase and possession delivered, decreed to be performed against a subsequent purchaser with notice, who had a conveyance, and paid his money.

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THE defendant *Butcher* being seized of the lands in question, which he had mortgaged to one *Colstock** for 400*l.* agreed with the plaintiff to sell the same to him for 700*l.* A short note was drawn up of the agreement (but not signed by either party) as follows:—*December* 9th, 1682, *Richard Butcher*, for 740*l.* does bargain and sell unto *Thomas Butcher* all those lands, &c. the plaintiff to have them from *Lady-day* next, and then the moneys to be paid; the plaintiff to have the hog pound, and dung, and the defendant to pay all taxes, &c. and is not to cut any trees, nor to put any cattle on the premises, and is to have the corn in the barn, &c. and to avoid it so soon as he can: the lands are in mortgage to *Colstock* for 400*l.* and the plaintiff is to pay for the writings. Soon after this agreement the plaintiff puts in his cattle and makes encroachment on the defendant *Butcher's* other lands; thereupon the defendant to prevent differences desires the plaintiff to repeal the bargain, which he refusing, the defendant told him he should not have the bargain, and advised him not to procure any moneys to pay for it, and drove the plaintiff's cattle off the ground, and soon after sold the lands to the defendant *Stapely* for 740*l.* and the 3d *February*, 1682, sealed articles for that purpose, and a bond of 1,000*l.* to perform the same. The 26th *March*, 1683, the plaintiff tendered his purchase-money and writings to seal,

which the defendant refused, and the 28th of the same month *Stapely* paid *Butcher* 240*l.* and took a conveyance of the estate free from incumbrances, except a mortgage; and in *June* after paid off the mortgage, and took an assignment of it to a friend of his own.

The bill was to have the bargain and agreement between the plaintiff and defendant *Butcher* decreed, and charged *Stapely* with notice of that agreement before his purchase, which *Stapely* and *Butcher* denied by answer; (1) nor was there any direct proof of notice, save that some neighbours in discourse did say, they had heard the defendant *Butcher* had sold the estate to the plaintiff. (2)

For the defendant *Stapely* it was insisted, that there was no sufficient proof of notice of the plaintiff's agreement, and that if there was notice, yet the agreement was not perfect nor binding by the act against *Frauds* and *Perjuries*, it not being signed.

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The *Lord Chancellor* declared, that in as much as possession was delivered according to the agreement, he took the bargain to be executed, (3) and that *Stapely* had notice of it, and that it was a contrivance between the defendants to avoid the bargain; and therefore decreed the defendant *Stapely's* bargain to be set aside, and that *Stapely* should execute a conveyance to the plaintiff upon payment of 700*l.* and interest, and the defendant *Stapely* to procure a conveyance from his trustee the assignee of the mortgage. (4)

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(1) Though purchaser does not know of an incumbrance before he pays his money, yet if he has notice before the execution of the conveyance, that will affect him equally, as it is all but one transaction, *Wigg* v. *Wigg*, 1 Atk. 384. So denying notice of the plaintiff's title at the time of the execution of the deed, or payment of consideration money is not sufficient, the answer must deny notice, at or before the execution, *Fitzgerald* v. *Burke*, 2 Atk. 397. Et vide further as to denial of notice, *Moore* v. *Mayhow*, 1 Ch. Ca. 34. *Story* v. *Lord Windsor*, 2 Atk. 631. So defendant denying notice to himself only, is a negative pregnant that there was notice to his agent, *Le Neve* v. *Le Neve*, 3 Atk. 649. So where the bill charges particular acts of notice, denial of notice generally will not do, *Radford* v. *Wilson*, 3 Atk. 815. *Senhouse* v. *Earl*, 2 Vez. 450. As to what will amount to notice, vide *Whitfield* v. *Fausset*, 1 Vez. 392. *Ashley* v. *Baillie*, 2 Vez. 370.

(2) Whatever is sufficient to put the party upon an enquiry, is good notice in equity, *Smith* v. *Law*, 1 Atk. 490.

(3) Vide *Cole* v. *White*, before *Lord Camden*, cited arg. in *Whitbread* v. *Brockhurst*, 1 Bro. Ch. Rep. 409. On plea and answer, answer denying that possession was delivered *as part performance of the agreement*, plea allowed, but not mentioned on what particular ground. Et vide dict. *Master of the Rolls*, in *Buckmaster* v. *Harrop*, 7 Ves. 347. Et vide also *Hollis* v. *Edwards*, ante 159, and cases cited in not. there.

(4) Nothing more with respect to

notice to *Stapely*, than that it is submitted that he being a purchaser for a valuable consideration, without notice of plaintiff's articles, ought not to be defeated of his said purchase, Reg. Lib. 1685. A. fol. 418.

Case 358. EDWARD ALLEN *versus* HENRY ARME.

Februar. 1685.

Lord Chancellor.

A voluntary surrender of copyhold lands, made by a man in his sickness, in favour of the nephew of his first wife, and out of respect to her memory, she being dead without issue, good against his second wife and her children by the second marriage, who claimed under a settlement of those lands made on such second marriage after recovery of that sickness.

THE plaintiff *Allen* being a servant to the defendant's grandmother, married one of her daughters, who brought him a portion of 600*l.* with part of which he purchased the copyhold lands in question, which were surrendered to the use of the plaintiff and his wife, and the heirs of their two bodies, the remainder to himself in fee. The wife soon after died without issue; and the plaintiff, with respect to her memory, and in kindness to the defendant her nephew, did voluntarily surrender the lands to the use of himself for life, with remainder to the defendant in fee, and the defendant was admitted to the remainder in fee, and paid 5*l.* fine. The plaintiff afterwards married again, and his bill was to be relieved against this surrender, as obtained by surprize and without consideration.

The cause was at issue, but no surprise proved; the bill abated by the death of the plaintiff and defendant both; and

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the plaintiff's wife, in behalf of herself and her son by him, brought her bill, in the nature of a bill of revivor (suggesting a settlement on her marriage of the copyhold lands upon her and her issue) against the defendant's widow, who claimed by surrender from her husband.

And upon the hearing (no surprise being proved) it was insisted for the plaintiff, that the surrender was made (as indeed it was) by the plaintiff's husband in the time of his sickness, and therefore it must be intended by him not to bind, in case he recovered of that sickness, it being merely voluntary, and that his intentions appeared so by his having after his recovery settled the same before his marriage on the plaintiff his second wife and their issue, who were to be taken to be purchasers, and ought therefore to be relieved against that voluntary surrender.

But the *Lord Chancellor* declared, he saw no equity in the case, nor could he infer any intention by any circumstances

in it contrary to the surrender, and therefore dismissed the bill, there not appearing any fraud or trust in the case. (1)

ALLEN v. ARME.

(1) That such intention may be inferred from circumstances, vide *Ward* v. *Lant*, Pre. Ch. 182.

GASCOIGNE *versus* THWING & Al'.

Case 359.

19 *Februar.*

At the Rolls.

Eq.Ca.Ab. 232, pl. 7.

A. purchases in the name of *B.* and pays the purchase-money.—*B.* claims the estate, there being no declaration of trust. *A.* may be admitted to read proofs, that he paid the purchase-money, but then those proofs must be very clear to make it a trust arising by implication of law.

THE bill was, that Sir *Thomas Gascoigne* in *October*, 1678, purchased a great manor-house and above *four* acres of land in *com. Ebor.* and took the conveyance in the name of one *Vavasor*, who had assigned to the defendant *Thwing*; and it was suggested, that the estate was bought with the plaintiff's money, and was upon trust, that one *Elizabeth Thwing* deceased should enjoy it for her life, and then in trust for the plaintiff and his heirs, who by the bill prayed the estate might be conveyed to him.

The defendant by answer denied he knew it was bought with the plaintiff's money; but believed it was bought with the proper money of the said *Elizabeth Thwing*, and that the conveyance was in trust for her and her heirs; and he claimed it as heir to her, and insisted on the statute of *Frauds* and *Perjuries*, there being no declaration in writing of any trust for the plaintiff.

The chief point was, whether when a man purchases land with his own money, and takes the conveyance in another man's name, this is such a resulting trust by implication of law, as is saved by the statute, and needs no declaration of trust. (1)

(1) Vide *Bird* v. *Blosse*, 2 Vent. 361. *Ambrose* v. *Ambrose*, 1 P.Wms. 322. confirmed in Dom. Proc. where, though declaration of trust in writing, yet it appears parol evidence would have done, *Lloyd* v. *Spillet*, 2 Atk. 150, and cases cited in not. there, [*Lench* v. *Lench*, 10 Ves. 511.] The statute of Frauds does not apply to personal estate, *Nabb* v. *Nabb*, 10 Mod. 404. And a trust may be raised by implication from letters, and a paper referred to by them, and in the handwriting of the party though not signed or dated, and by operation of law from advances of money, *Forster* v. *Hale*, 3 Ves. 696. Vide also *Tawney* v. *Crowther*, 3 Bro. Chan. Ca. 161. 318. [But see as to the authority of the latter case, *Clinan* v. *Cooke*, 1 Sch. & L. 33.]

GASCOIGNE v. THWING. [367]

And after long debate, whether the plaintiff should be admitted to read, to prove the money was his, the proofs were read: and they amounting only to what had passed in discourses, and been owned by the defendant, and the proofs being doubtful, the *Master of the Rolls* dismissed the plaintiff's bill, (1) because the proofs were not sufficient whereon to ground a decree; and said, there was some secret in the cause, which he did not fully apprehend, and was not made clear upon the proofs. Now the truth of the fact was, that this great house was bought with a design to make a nunnery of it, and the said *Elizabeth Thwing* was to be the Lady *Abbess;* and that project failing, the defendant set up for himself.

(1) But without costs, Reg. Lib. 1685. A. fol. 263.

Case 360.

Lord Chancellor.
Master of the Rolls.
Eodem die.

ASH *versus* ROGLE and the DEAN and CHAPTER of ST. PAUL'S.

Eq.Ca.Ab. 119, pl. 5. S. C.

Bill brought by a remainder-man in fee, of a copyhold expectant on an estate tail which was spent, to be relieved against an erroneous common recovery in the lord's court, praying that the lord may be decreed to suffer plaintiff to bring a *plaint* in the lord's court in nature of a writ of error to reverse this recovery, or that this court would relieve on the merits. The defendant demurred, and the demurrer was allowed.

THE bill was brought by a remainder-man after an estate tail spent, to be relieved against an erroneous recovery of a copyhold estate in a Court *Baron* suffered above *thirty* years ago; and the relief sought was, that the Dean and Chapter, who were lords of the manor, *might be decreed to suffer the plaintiff to bring a *plaint* in the nature of a writ of error or false judgment, in their Court *Baron;* or else that he might be relieved upon the merits of the cause by the decree of this court.

[*368] The estate had been enjoyed under the recovery ever since, though the estate tail was spent many years ago. The defendant *Rogle,* who claimed the estate under the recovery, demurred; for that it would be of dangerous consequence to all persons, who claimed under recoveries of copyhold estates, to draw the same in question in this manner: for that through the ignorance of stewards of copyhold courts, it frequently happens, that all the legal requisites to a common recovery of freehold lands were not observed in recoveries of copyhold estates; and yet the barring of copyhold

estates by recoveries in such courts having obtained in many manors, it would shake many of them, if upon niceties in form they should be impeached; and insisted, there was no precedent, that any relief in such case was ever given in this court; and that it was better to suffer a particular mischief in this case, than by relieving it to make a precedent of general inconvenience to owners of such estates.

The Dean and Chapter answered the bill, and submitted to do as the court should direct.

This demurrer was first argued by learned Serjeants at Law and counsel on both sides solemnly, before the *Master of the Rolls*, who allowed the demurrer; and afterwards being re-argued before the *Lord Chancellor*, he was of the same opinion, and confirmed the *Master of the Rolls'* order; both of them severally declaring, it would be of dangerous consequence, and contrary to equity, to give any relief in such a case: (1) and yet the errors assigned by the bill in the recovery were such, as would have been gross errors in a recovery in a freehold estate: and the *Lord Chancellor* said, if there had been an error in any adversary proceedings in the Lord's court, this court would have ordered the Lord to proceed and examine it. You may try the common-law courts, whether they will grant you a *mandamus:* you shall have no aid from this court. (2)

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(1) And that there was no precedent of such a bill. R. L.

(2) There is nothing of this latter clause in the Register's Book. Reg. Lib. 1685. A. fol. 295. Vide *Freeman* v. *Freeman*, Pre. Ch. 28. *Clarke* v. *Ward*, ibid. 150. But equity will restrain the operation of a fine to such lands as do really belong to the conusor, though more parcels of land be comprized in the fine, *Brereton* v. *Gamul*, 2 Atk. 241. So where a fine and non-claim is levied by one who got possession under a forged deed, equity will relieve against the fine, *Cartwright* v. *Pulteney*, 2 Atk. 381. So *Baker* v. *Pritchard*, ibid. 388, 390, and the person so obtaining the estate decreed a trustee, and to re-convey, *Barnesly* v. *Powel*, 1 Ves. 289. So *Wilkinson* v. *Brayfield*, post 2 vol. 307. So where a fine levied pursuant to a decree of this court, for a particular purpose, the court will not permit it to be taken advantage of for letting in other debts and incumbrances, *Baden* v. *Earl of Pembroke*, post 2 vol. 56. But a fine can be reversed but by writ of error only, vide Cruise on Fines, 316.

Note.--From this decree of dismission there was an appeal to the House of Lords, and there the decree was affirmed; for that common recoveries not being adversary suits, but common assurances, equity ought rather to supply defects than to assist in the annulling them, Show. Parl. Ca. & Eq. Ca. Ab. 119, pl. 5. Vide remark of *Wilson*, Ch. Just. *Martin* v. *Strachan*, 1 Wils. 73.

Case 361.
27 Februar.
In Court.
Lord Chancellor.

BELLASIS *versus* BENSON.

Eq Ca. Ab. 229, pl. 9.

A settlement of a jointure actually made is an evidence that all parol agreements before the marriage were resolved into that.

THE bill was to be relieved touching the plaintiff's jointure, which the bill charges was by parol agreement made on the marriage agreed to be 400*l. per ann.* The defendants plead, that after all treaties and agreements touching the marriage-settlement, a jointure was actually settled and accepted, and the marriage thereupon had, 18 years since.

Lord Chancellor. The jointure-deed is an evidence, that all the precedent treaties and agreements were resolved into that; but ordered the defendants to answer, and save the benefit of the plea to the hearing. (1)

(1) Plea overruled without costs on either side. Reg. Lib. 1685. A. fol. 347. Vide *Benson* v. *Bellasis*, ante p. 17.

Case 362.
Eodem die.

BRIGHT *versus* WOODWARD.

Eq. Ca. Ab. 240, pl. 30. S. C. 2 Ch. Ca. 201. S. P.

After a suit against an executor in this court, he shall not be allowed payments made voluntarily without suit.

ON exceptions to a Master's report, *Lord Chancellor* was of opinion, that after a suit commenced here, an executor shall not be allowed any payments made voluntarily without suit. (1)

(1) In this case the Master had certified that the defendant had paid a debt of 56*l.* to *Thomas Bright*, his co-executor, *but since the bill exhibited*, and therefore desired the direction of the court whether it ought to be allowed: upon debate of the matter his Lordship declared the said debt ought to be allowed, the said *Thomas Bright* being an executor, and might prove the will, and retain sufficient to satisfy the same. Reg. Lib. 1685. A. fol. 377. Vide *Solley* v. *Gower*, post 2 vol. 61. Contra in the case of legal assets, *Goodfellow* v. *Burchett*, ibid. 300. *Darston* v. *Earl of Orford* & *Others*, Pre. Ch. 188. And it seems now settled that executors in equity, as well as at law, may prefer any creditor in equal degree, but that executor will not be permitted to pay a bond creditor without having given him judgment in the case of a bill filed, any more than in the case of an action, *Waring* v. *Danvers*, 1 P. Wms. 295. *Robinson* v. *Tonge*, 3 P. Wms. 401, and note (D) there; a decree in equity although it cannot be pleaded at law, being equivalent in the administration of assets, to a judgment at law, *Morrice* v. *Bank of England*, Forr. 225. Et vide Toller's Law of Executors, p. 226. Fonbl. Tr. Eq. Book 4. Part 2. Ch. 2. s. 3. *Harding* v. *Edge*, ante 143. But an executor, where he has legal assets, may pay debts of a higher or as high a nature after a decree, *quod computet*, though not after a final decree, *Mason* v. *Williams*, 2 Salk. 507.

A commissioner may be a witness, but then he ought to be examined before any other witness be examined.

BRIGHT v. WOODWARD.

A commissioner may be a witness, but he must first be examined.

SIR ROBERT SAWYER, Knt. his MAJESTY'S ATTORNEY GENERAL, on behalf of his MAJESTY . . . . . } Plaintiff;

and

EDWARD VERNON, Esq. RUPERT BROWN and SAMUEL BOHEME . } Defendants.

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Case 363.

26 *Februar.*

Lord Chancellor Jefferies.

Lord Chief Justice Jones.

Lord Chief Baron Mountague.

A patent of lands granted by the crown set aside by bill in equity, as unduly got.

Ante Case 278.

THE information set forth, that his Majesty was seised in fee, as parcel of the Duchy of *Lancaster*, of the honour of *Tudbury* in com. *Derby*, *Stafford*, *Leicester*, *Nottingham* and *Warwick*, and of the manor of *Tudbury*, the forest of *Needwood*, the offices of High Steward of the honour of *Tudbury*, constable of the castle and lieutenant of the forest of *Needwood*, and bailiff of the new liberty, and bailiff of the castle and manor of *Tudbury*, and high steward of the lordship and manor of the *High Peake* and *Mirkersworth*, the office of steward of *Newcastle-under-line*, lately granted to *William Levison Gower*, Esq. and of all those lands, tenements, and hereditaments, parcel of the demesne lands of the said castle and manor of *Tudbury* demised by his late Majesty to *Michael Andrews*, and since by his now Majesty to *Mary Blagg*, and divers other lands, privileges, &c. all which premises are parcel of the Duchy of *Lancaster*, and are one year with another 2,000*l.* *per ann.* and his Majesty ought accordingly to enjoy the same without interruption, and to receive the rents and profits after the expiration of the lease granted of some part thereof, and is also entitled and ought to have the benefit of all the timber and wood on the premises, which amounts to above 30,000*l.* and no waste or other prejudice to the disinherison of his Majesty ought to be done.

That the defendants by combination to deprive and prejudice his Majesty in his right in the premises, and to commit waste therein, have lately entered on the premises, and [371] begun to cut down the timber, and give out they will cut

SIR ROBERT SAWYER v. EDWARD VERNON, ESQ.

down all or the greatest part thereof, as also the *Hollywood* and *Underwood*, to the apparent wrong of his Majesty, pretending some title by descent or conveyance from some of the King's ancestors, or that the same or greatest part thereof is duly granted unto them out of the crown by his now Majesty; whereas if they have any such grant the same was obtained by unusual means, and by surprize, and ought not to be binding to his Majesty, he being not duly apprized thereof. That about *September*, 1683, the defendants proceeded in a clandestine manner to deceive his Majesty, by making a colourable proposal for paying some inconsiderable sum far short of the real value, and the getting in the interest of some grounds at *Sheerness* for his Majesty and discharging the arrears due from his Majesty, for the same, which would amount to above 4 or 500*l.* and yet no money has been paid to his Majesty; and the defendants endeavoured to have the ground at *Sheerness* estimated at 300*l.*

That in *October* following, the defendants petitioned his Majesty for the said grant, and a reference to Sir *Thomas Chichley*, Chancellor of the Duchy, and a report was hastily obtained from him in the same month; and about the 19th of *November* following a warrant was signed for passing a grant of the premises, and about two days after a grant was obtained under the Duchy seal, albeit all endeavours were used to stop the grant by his Majesty's express commands, and by the order of the Lords of the Treasury on the 19th of *November*, and particular application was made to the Chancellor of the Duchy, but in vain, he denying he knew of any such grant; nor could it be known, till a particular was found at a scrivener's shop about a month after: which proceedings are contrary to the course that hath always been, and ought to be observed in passing grants of inheritance under the Duchy seal; for there ought to have
[372] been first a warrant of the auditor to make a true particular to the surveyors, who return an estimate, and thereupon and not before, a warrant is granted by his Majesty, and then the clerk draws up a grant for the King's attorney of the Duchy's perusal, who upon his approving thereof signs the bill with a docket, which afterwards being signed by his Majesty, passes the seal of the office; but by the defendants' hasty and unusual proceedings, there is no such grant yet registered with the clerk, nor inrolled with the auditor, nor any footsteps of the proceedings to be seen in the said office. That his Majesty is deceived, not only to his disinherison,

but to the apparent prejudice of the crown; and the said honours, manors and forests being of so great extents and large privileges and royalties, and multitudes of the nobility, gentry, and freeholders, copyholders, and others having dependance there, and being thereby furnished with all necessaries for profit and pleasure, they are most proper to be preserved in the crown.

That the defendants obtained the said grant by untrue particulars, the estates in such particulars being set down of less value by some 1,000*l.* by the year than the same are really worth, and the wood and timber not valued, though worth above 30,000*l.* and the quantity of acres represented less by some thousands than they are, and several great privileges and profitable matters having no value at all set on them, as appears by a particular lately returned to his Majesty by his Surveyor-General, whereby the premises are estimated at above 60,000*l.* nor is there any considerable rent reserved: for all which causes and other imperfections the said grant ought not to deprive his Majesty of the possession and right thereto, nor ought any of the timber to be cut down by virtue thereof, but such grant ought to be delivered up and cancelled; and therefore it was prayed by the said information, that the defendants may set forth what proposals were made to his Majesty for obtaining the said grant, by whose interest procured, what reference was made thereupon, and whether any report was made, by whom, and [373] how long after the reference, when the warrant was signed by his Majesty, and the grant passed the seal, and whether any enquiry was made after it from his Majesty before it was sealed, and what answer was given him, whether any report was made by the Auditor or Surveyor-General, or why omitted, and where were the particulars signed; whether it is not the usage of the Duchy to have all grants of inheritance pass, as before is suggested, and why the said grant passed without observing that course; for whose benefit the said grant was made, and for what considerations, and the value of the premises when the said grant was passed, and of the timber and wood on the same; that the defendants' proceedings in committing waste might be staid, and that the said grant might be decreed to be delivered up and cancelled, and such further relief had as should be meet.

The defendant *Vernon* pleaded his patent, and that he was

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a purchaser; which being over-ruled, he answered and insisted on his title; and by answer set forth, that he believed the late King was seized in fee, in right of his Duchy of *Lancaster (inter al.)* of the honour of *Tudbury* and forest of *Needwood*, and other the particulars hereafter mentioned to be granted to Mr. *Brown* and *Boheme*, though not of such great value as in the bill. That the defendant having several leases of parcel thereof, for long terms at a considerable yearly rent, as also offices and commands within the forest and honour, and having expended great sums in building and repairs and otherwise, and the King's rents having been increased on taking some of the leases, and the reversions of some of the lands therein having been granted to others, and being informed endeavours were used to obtain the reversion in fee of the lands in lease and all the rest in the information with the rents thereon, the defendant was
[374] induced to draw up a petition for the King's granting the premises to such as the defendant should nominate; that he having acquainted the Duke of *Ormond* with his intentions, and the Duke (as he believes and doubts not to prove) advised with the Attorney-General therein, and obtained the favour to make the King acquainted therewith, the Duke being privy to what the defendant had done and suffered for the service of the late King's royal father and himself, as also for that the Duke had an interest in the premises, of which the grant was sought, being steward of the honour and constable of the castle of *Tudbury* and lieutenant of the forest *(inter al.)* which are held for the lives of the Duke and the Earls of *Arran* and *Ossory*, and a lease of the scite of the castle for about 90 years yet in being.

That he attended the Earl of *Sunderland*, one of the Secretaries of State, with a petition to the King in the name of *Rupert Brown*, the defendant's nephew (whose name he made use of to prevent a merger of his lease) with the proposal annexed, *viz.* That the King would be pleased to grant to the defendant the inheritance of the honour of *Tudbury*, and forest of *Needwood*, with the lands thereto belonging, parcel of the Duchy, pursuant to the proposal annexed, *viz.* To pay to the King 7,000*l.* in money, to reserve the old rents and to pay to the King as much as would amount by increase of rent and deduction of fees to 70*l. per ann.* To convey to the King the lands whereon the fort of *Sheerness* was built, with a release of all demands by reason

thereof, and to keep for his Majesty's service 1,000 deer for ever, clear of all charges, *prout* petition and proposal 29th of *September*. (1) SIR ROBERT SAWYER v. EDWARD VERNON, ESQ.

That the Earl of *Sunderland* signed an order of reference to the *Chancellor* of the Duchy, *viz.* that his Majesty was graciously pleased to refer the petition and proposal to Mr. *Chancellor* of the Duchy to consider of it, and report what might be fit to be done therein for the King's service and the petitioner's gratification, which his Majesty was disposed to, *prout* order. [375]

That the *Chancellor* having informed himself by surveys and otherwise (though what his methods therein were, the defendant knows not) and reported a satisfactory account thereof, the King signed a warrant authorising the *Chancellor* to pass a grant of the premises, in the same words with the grant hereafter mentioned.

That by indenture dated the *twentieth* of *November* 1683, duly executed and enrolled between his Majesty of the one part and the defendant on the other part, reciting that *Godfrey Meynell* for 400*l.* had granted to the defendant and his heirs all those 23 acres of fresh and 17 acres of salt marsh in the island of *Sheppy*, whereon the fort of *Sheerness* was erected, and all his estate and interest therein; the defendant granted and released the same and all his interest to the King, his heirs and successors, and all moneys whatsoever which were due or owing to or could anywise be demanded by the said *Meynell* and defendant or either of them, the defendant having power from *Meynell* in that behalf. *Prout* deed.

That in consideration thereof and of 7,000*l.* *bonâ fide* paid by the defendants or some of them into the receipt of the Duchy, and for other considerations, the King by his warrant under his sign manual in the words in the patent hereafter mentioned, and in pursuance thereof by his letters patent under the Duchy seal executed by livery and seisin, did give and grant, *prout letters patent.*

Knows not whether by the usage of the Duchy Court grants of inheritance ought to pass in such manner and form as by the bill is set forth, but believes the grant was duly passed, and is effectual in law, and whether or no the grant was enrolled is not material. Insists that the grant ought not to be impeached on pretence of an over-value, or the de- [376]

(1) This, relating to the deer, is not stated in the Register's Book.

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fendant drawn under an examination in this court touching the same; for he avers, that in the lifetime of the late King *Charles* the *First* he did faithfully and with the hazard of his life serve him in the late war in arms, and was by the *Usurper* long imprisoned in the *Tower*, and thereby and otherwise suffered much both in his estate and person. That although the patent was taken in the name of *Brown* to prevent a merger of the defendant's leases, and also in the name of *Boheme* to prevent *Brown's* wife from claiming dower, yet their names were purely made use of at the defendant's nomination and in trust for him and his heirs, and was granted in favour of this defendant at the instance of his friends and with respect to his sufferings, as well as for the consideration of the conveyance of the lands in the Isle of *Sheppy* and the 7,000*l.* which the defendant avers was really paid for the King's use to *Nathaniel Curson*, Deputy Recorder of the Duchy, *prout* his receipt.

That in as much as the grant is of his late Majesty's special grace, as also for the considerations before mentioned and in the grant expressed, the defendant insisted, the patent ought not to be impeached under pretence of surprize, or want of consideration, or any of the suggestions in the bill, for which there is no ground in the patent, especially since it is a grant of the honour, lands, &c. in the *bill*, which ought not to be impeached by an *English* bill in this court, being no court of record; and is advised, it would be in derogation of his Majesty's grants and of dangerous consequences to all his subjects, such especially as claim any estate of inheritance by letters patent, if they should be drawn under question on such pretences as in the information; especially since the suit wants a precedent: and if these be grounds to avoid the King's grant, they are such as may lie against all that are of the King's favour, and
[377] other considerations: nor can any averment lie against such grant, where his Majesty's grace and favour is an ingredient in it.

That the patent is matter of record, and good in law, and that the common law ought to determine the validity thereof; nor ought, nor can a patent, if a matter of record, be vacated or cancelled by a decree on *English* bill; and the rather for that such considerations as aforesaid have been paid and satisfied, besides the great charges in passing it; and the defendant is entitled to the protection of the court, as a purchaser, and the validity of the patent ought not to be im-

peached here, whereby the defendant may lose the 7,000*l.* and *Sheerness* lands. SIR ROBERT SAWYER *v.* EDWARD VERNON, ESQ.

That as to the particular mentioned to have been returned to the King by his Surveyor-General, the defendant insists that the same being *ex post facto*, no use ought to be made thereof to impeach the grant; nor is the same true, but set on foot, not for the king's advantage, but by some who would impeach the defendant's grant, in expectation of a grant thereof to themselves, most of the particulars thereof being valued at excessive rates, and many thereof being in jointure to *Queen Dowager* with a power of filling up leases for thirty-one years at any time during her life; and as appears by the particular, the surveyor has taken many things by hearsay and by the relation of others, who would impeach the grant, and great values are there put upon reversions after long leases on inconsiderable offices, such as were never valued in a purchase; as the offices of steward, bailiff, and the like, the profits whereof will scarce answer the trouble of any that are capable to be trusted therewith: and the surveyor has computed the soil of the forest at 27,200*l.* upon a supposition that the forest may be inclosed: whereas there are several persons of quality and worth, that have charters and claim estovers and right of common throughout the forest. And whereas in the late wars there was an [378] ordinance for inclosing it, yet the same could not be effected without an armed force, much less is it probable that this defendant should compass it. Neither is the surveyor's valuation of the timber less extravagant, being computed at 30,000*l.* and he is mistaken in quantity and value, as may appear by two surveys taken in the late times with more exactness, the one in 1650, which values the wood and timber at 13,591*l.* 18*s.* the other in 1658, where they are valued at 12,284*l.* 18*s.* 2*d.* out of which estovers were to be allowed *prout* surveys: and afterwards timber to the value of 3,098*l.* 9*s.* was cut down and sold by the usurpers; and the wood in the forest was certified in 1662 and 1663, by the late Lord *Seymour*, and the officers of the forest, to be worth about 12,000*l.* and believes they really thought it worth no more; and much of the timber has been since cut down and carried away by several grants from the king, and many of the best trees have been picked and culled out, for such as claim estovers; the Earl of *Devonshire* claiming (*int' al'*) 3 cart load of wood from the exaltation till the invention of the holy cross once a year, and as much timber

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as was necessary for building and repairing old houses and tenements formerly belonging to the prior and convent, and the tenth penny and part of all timber sold within the chase, and other tythes and perquisites, *prout* the Earl's answer in the Duchy.

That considering the matters before, as also that the country there abounds with timber, and no navigable river near, much of the timber to be preserved for estovers, and holleys, and underwoods, and other woods are to be preserved for the deer, which the defendants are obliged to keep; the surveyor's report will appear to be grounded on mistakes, and made up of extravagant computations, and imaginary values.

[379] That the honour of *Tudbury* was formerly of a great extent and dependencies, yet it is not now of such consideration to the crown, as the bill surmises, being dismembered and reduced to a narrow compass: the most considerable manors and lands formerly held of it being transferred and held of others of the King's manors, and particularly 6 *Car'* I. (*int. al'*) the inheritance of the manor of *Braseington*, *Bouteshall*, *Sherrald* Park and lands in *Tudbury* were granted to *Charles Harbord*, Esq. *& Al'*, in consideration of 2,207*l.* in money, and a debt of 2,350*l.* and of the King's grace, which are of the value of 3,000*l. per ann.* (as informed) and are held of the honour of *Enfeild*.

Denies the late king was surprised or deceived in the passing of the grant, or that any false particulars were delivered to the King by the defendant or any other to his knowledge, or that the king was misinformed (unless by the particulars of the surveyor's general in the bill) of the quantity or value of the premises, but believes the contrary.—

Denies he knows or believes that there was any order or direction by the late king or lords of the treasury for the hindering or stopping of the grant, or that any order or message for that purpose was sent or delivered to the *Chancellor* of the Duchy on the 19th of *November*, 1683, or before the passing thereof: but if such had been, the *Chancellor* of the Duchy (as believes) would have obeyed it; and believes it altogether untrue, and without ground; for that (as informed) the King for a considerable time after the grant was passed expressed himself to be well satisfied therewith, and declared he designed the 7,000*l.* consideration for a particular use (as informed and believes) and has heard that a month after the grant passed there was a paper left

with the *Chancellor's* secretary, *viz.* Let no grant pass of *Castlehay Agardsley* little park and *Hanbury* Park, the Castle of *Tudbury*, and the rangership of *Needwood* Forest, till notice to my Lord *Dartmouth*, his lady, or Mr. *Richard Grahme*. SIR ROBERT SAWYER v. EDWARD VERNON, ESQ.

Denies any endeavours were used by him or any to his knowledge to have the *Sheerness* lands valued at 3,000*l.* or a greater sum than the real value; the consideration paid by the defendant for the same appearing in the grant, though he believes he bought the same at a great under-value. [380]

Believes after the grant passed, a particular of the things thereby granted, as well as of the defendant's leases, and estates therein, might be left by the defendant *Brown* at a scrivener's in *London* to procure 10,000*l.* thereon for the defendant; but the same was not thought a sufficient security; and the defendant being thereby disappointed, and the defendant *Brown* having advanced and become bound with the defendant for several sums, it was agreed between them, that *Brown* should become a purchaser of a full moiety of the premises for 7,000*l.* (which was the 7,000*l.* paid to the late King) and should discharge the defendant from all engagements that he stood bound in for raising thereof, and that *Brown* should lend the defendant 3,300*l.* on a mortgage of the other moiety; and thereupon this defendant, the defendants *Brown* and *Boheme*, by good assurance well executed by way of lease and release, conveyed the premises to Mr. *Serjeant Birch* and his heirs; as to one moiety thereof, to the use of *Brown* and his heirs, and as to the other moiety to the use of *Birch* and his heirs, in trust first by sale or profits to raise and pay the 3,300*l.* with interest to *Brown*, afterwards for payment of the defendant's debts, and afterwards in trust for the defendant and his heirs.

Denies he has committed any waste or felled any wood since the grant, though he says by several leases to him made of part of the premises, there are botes granted to him, and timber for new buildings and repairs.

The answer of the defendants Brown *and* Boheme. [381]

Rupert Brown believes the late King was seized, in right of the Duchy, of the honours, manors, &c. in bill; and the defendant *Vernon* informed him, he had a promise from the King of a grant thereof, in consideration of a conveyance of *Sheerness* lands, and of 7,000*l.* That the grant being agreed to be taken in the name of the defendant *Brown*

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and the defendant *Boheme* his servant, the defendant *Brown* at the defendant *Vernon's* request advanced and paid the moneys. That the King in consideration thereof, and for other considerations in the patent mentioned, by letters patent under the Duchy seal, whereon livery was executed, under the rents and covenants therein, granted to the defendants *Brown* and *Boheme* and their heirs, the premises in the words therein *prout;* that afterwards, at the desire of the defendant *Vernon*, the defendant *Brown* lent at interest to him the sum of 3,000*l.* which, with 300*l.* before due to *Brown*, together with interest for the same, was agreed to be secured on part of the premises, which part was for that purpose conveyed to *Edward Birch*, Esq. named by the defendants *Brown* and *Vernon;* the estate in law of the rest of the premises being then settled to the use of *Brown* and his heirs, in consideration of the 7,000*l.* which was paid with the defendant's proper moneys to Mr. *Curson*, receiver or deputy receiver of the Duchy, *prout* receipt.

That for the 7,000*l.* and 3,300*l.* the defendant is a real purchaser of the premises; besides the defendant hath been put to great charges for drawing of writings, advice of counsel and other matters relating to the premises.

Both say, that as to the ways or means of obtaining or passing of the grant (other than the paying the 7,000*l.* and conveying *Sheerness* lands) they are ignorant, being transacted by the defendant *Vernon*, to whom the King intended a considerable reward. *Brown* insists that the grant is good in law, and ought not to be impeached on the suggestions in the bill in a court of equity; and cannot give any account of the proposals or proceedings in obtaining or passing the grant, being managed by the defendant *Vernon*, and the defendant concerning himself no further than the paying of the 7,000*l.* and seeing the conveyance of *Sheerness* executed.—Conceives the court will be very tender to examine any of the methods or means, how such grant came to be passed, when it has received the allowance of the proper officer. That the defendant hath paid in part of the rent reserved on the patent to *Curson*, for the King's use, 6*l.* 11*s.* 9*d.* (1)

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And the defendant *Boheme* says, that he being a servant to the defendant *Brown* is a stranger to the premises, further than that his name was made use of in the patent, and disclaims any interest in the premises.

(1) This does not appear in the Register's Book.

The proofs as to the values were very various; and the Surveyor General's survey, which made it amount to 60,000*l.* was reduced to one-half, even by the Attorney General's own proofs. *Vernon* proved the surveys and all the matters in his answer fully; so that upon weighing the proofs on both sides, the extremity of the full value did not amount to 20,000*l.* *Vernon* proved his Majesty's order of reference 29th *September*, 1683, from the Lord *Sunderland* principal Secretary of State, to the *Chancellor* of the Duchy, and the 19th *November*, 1683, the warrant signed *Charles Rex*, and countersigned by the *Chancellor* of the Duchy; and the 20th *Novembris*, 1683, *Vernon's* conveyance of the land at *Sheerness* to the King enrolled: and the 21st *Novembris*, 1683, the patent passed the Duchy Seal. The Attorney of the Duchy proved the methods of passing grants, but that when by the King's immediate command the lands are ascertained, the estate limited, and rent fixed, (as it was here) grants have passed by privy seal or signet. The Duke of *Ormond* proved a letter writ by himself, and sent by *Vernon* 29th *August*, 1683, to the Attorney General, signifying, that he had left *Vernon's* proposals with the Lord *Rochester* the first Commissioner of the Treasury, and that the attorney's answer was, such grant might be legally passed; and that the King declared to the Duke he intended a kindness to *Vernon* by the grant, and was well satisfied with it, and did not express his displeasure, till the country gentlemen petitioned against it; and he and the Earl of *Ardglass* and others fully proved *Vernon's* service and sufferings for the crown, his being a Colonel in the time of the rebellion, his supplying the King with 2,000*l.* in his exile, and other signal services, which the King often owned, and his being many years imprisoned under *Cromwell* in the *Tower*, and in danger of being put to death in endeavouring the King's restoration.

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For the King it was argued, that an *English* bill was the proper remedy in this case, for that no *scire fac.* would lie, it not being a record of this court; and if it would, yet a *scire fac.* would not reach this fraud, it not appearing within the body of the grant; (1) and equity here did but follow the law; many things even at the common law being such surprizes, as should avoid letters patents in a *scire fac.*; and if a man had been so cunning, as to avoid those particular badges of fraud and surprize that came within the reach of

(1) Vide post 388.

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the common law, and there was a fraud and surprize in the present case, though compassed in another method, it was fitting the King should not be left without relief in such a case; if he was, he would be in a worse condition than a subject, who should avoid a conveyance, nay a fine, when obtained *mala fide*: (1) and it was not fitting, that it should be left in the power of the King's officers by their connivance to put his Majesty without relief in the case of a fraud and suprize: and though there was no precedent of any such

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suit, yet all precedents had a beginning; and there was scarce any precedent of such a fraud and surprize: and as the remedy was proper, so in this case there was sufficient ground for a decree, there being all the badges of fraud and surprize imaginable. 1*st*. In the passing of the grant, no warrant to the auditor to make out particulars; no warrant to the surveyor to return an estimate; no bill with a docquet signed by the attorney; none of the usual methods observed, but only a warrant under the *sign manual* for passing the grant in question to the *Chancellor*, and countersigned by him; which is to make a warrant to himself, a thing never before heard of; and though a patent may pass by immediate warrant under the privy seal or signet, yet this is in effect no warrant; being only under the sign manual, and no seal to it, neither privy seal nor signet: and then the hasty proceeding is remarkable; this warrant was signed but the 29th of *November*, and the patent passed the duchy seal the 31st of *November*, though it would take a week's time to ingross it: and here the petition, proposal, the *Chancellor's* report, and warrant for the grant, are all of the hand-writing of *Woolley*, the defendant *Vernon's* man: and the overvalue in this case was excessive, and the consideration of the defendant's services and sufferings were not to be regarded in the case, the patent being but in common form, and no particular notice taken of any services or sufferings; no gratuity or bounty being intended by the *King*, but it was a bare purchase, and the patent recites the consideration, and that the dependencies were great, and not fitting to be severed from the crown; many noblemen hold of this honour: and the precedent will not be of such dangerous consequence as is pretended, for there must be a recent prosecution in the case of a surprize; and here it was immediately; but an

(1) Vide *Noel* v. *Robinson*, ante 93. *Bellasis* v. *Benson*, ante 369.

acquiescence for any considerable time would have amounted to a confirmation.

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For the defendant it was said, that there are two questions, *first*, whether the grant be avoidable by *English* bill? *Secondly*, if avoidable, whether there be sufficient ground to avoid the patent in question?

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1*st*. There is no precedent of any such suit ever brought into this court, and it is *Littleton's* rule *what never was, never ought to be:* and it is in itself repugnant, that letters patents being matter of record should be destroyed by *English* bill; the *English* side of the Court of *Chancery* being no court of record: and besides, the law having set the bounds what matters shall be reckoned sufficient to avoid the King's grant, and what not, and provided remedies for such cases, equity ought not to go beyond the law in this case; and the rather, for that relief in equity ought to be mutual: now if the patent had been defective, or had not passed so much land as was intended, yet this court would never have relieved the subject, as in *Doddington's* case, (*Co.* 2 report) where even in the body of the patent it appeared more land was intended to have passed, yet there being a defective description of it, judgment was given for the second patentee against the first, who was a purchaser; and it was never heard that the patentee came into this court for relief, though the lawyers in my Lord *Cook's* time were men of great learning and abilities, and knew well how to advise their clients, had they looked upon it as a case proper for this court to have intermeddled with: but in former ages it was not thought that letters patent, being matter of record, could be altered or set aside by *English* bill; (1) but acts of resumption were then thought necessary; but this indeed is a more easy and expeditious way, if it is to be admitted.

An over-value was never yet thought a sufficient ground to repeal a patent in a *scire fac.*, for Kings are presumed to be bountiful; and though all that a subject can do is but what his duty obliges him to, yet there are in this as strong motives to incline his Majesty to be bountiful to the defendant, as can be in any case; for here the defendant sold 400*l. per ann.* and spent it in raising and maintaining a regiment for his Majesty's service, and was all along in arms from the first setting up the standard at *Nottingham*, and was in-

(1) But the patent itself is a sufficient record whereon to found a *scire fac.* for repealing the patent. The *King* v. *Sir Oliver Butler*, 3 Lev. 223.

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strumental in his late Majesty's escape from *Bristol;* suffered two years imprisonment in the *Tower*, presented his Majesty with 2,000*l.* in his exile, &c. and the Duke of *Ormond* proves, that the King designed him a gratuity and reward by the grant in question. It is a matter much in derogation of his Majesty's grants, that they should be impeached on the pretences in the information, and of dangerous consequence to all patentees, especially if the succeeding King shall avoid his predecessor's grant on pretence of an over-value; nor is that mischief answered, in saying there must be a recent prosecution; for the law says *nullum tempus occurrit regi;* and the law has no more ascertained what shall be called a recent prosecution, and what not, than it has what shall be reckoned an over-value to avoid a grant, and what not.

As to the objection that this patent did not pass in the ordinary and regular method, and had not its due progression, it was answered, that this must be taken to be well passed, and to be a good grant at law, otherwise there would be no need of an *English* bill, but might be avoided by *scire fac.;* for the patent may be removed by a *certiorari* into this court, and then a *scire facias* will lie: (1) and the methods of passing grants in the *Duchy* are various, and the Attorney of the *Duchy* in his deposition says, many grants have passed by immediate warrant under the Privy Seal or Signet; (2) and they took it, that a warrant under the sign manual was as valid as if it had been under the signet or privy seal: (3) and in this case expedition and secrecy, which are objected to as an evi-

(1) Vide post 390.

(2) And a grant of lands, within the county palatine of *Lancaster*, under the great seal only is not good, *Fleetwood* v. *Pool*, Hard. 171. But the production of the Duchy seal at the hearing was sufficient, ibid. So a grant of the next avoidance of a church, the advowson of which belongs to the Duchy, under the great seal is not good, 2 Rol. 182. D. 1. But it seems that a presentation to an advowson parcel of the Duchy may be under the great seal, for it is a fruit fallen, and not within the stat. 3 Hen. VII., being but a recommendation of a clerk to the ordinary, which may be by parol, 1 Rol. 182. D. 2. Et vide Plow. Dutch. Lanc. 218.

(3) If the sign manual be to a grant or warrant regularly, it ought to be countersigned by a principal Secretary of State, or the Lords of the Treasury, Eq. Ca. Ab. 209. If the warrant be but a direction for another act, as for letters patent to be made, &c. it is sufficient that it be countersigned, but if it be of itself the principal act it is countersigned, and also sealed with the signet or privy seal, ibid. 54. But where an Act of Parliament directs that the King assign securities, &c. by his sign manual, it need not be countersigned, ibid. 209.

dence of a surprize, were but necessary, it appearing in the cause that the defendant had a powerful competitor, the Lord *Dartmouth* endeavouring to obtain a grant of the things in question: and the objection, that the warrant for the patent and other papers were wrote by the defendant's servant, is of no great weight, it being common for patentees to make use of their own counsel; and patents are many times drawn by them, and ingrossed by their clerks; and if the proper officers are answered their fees, there is no great hurt in that; since that is not a reason sufficient to avoid the patent.

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As to the over-value, the proof is various; there have been no less than three former surveys, which in all other cases have been the foundation from which they have taken their measures in the *Duchy;* and if our witnesses are to be credited, there is not really any considerable over-value in the case; and the surveyor's certificate here is *ex post facto*, and that not by the Surveyor of the *Duchy*, who is the proper officer in this case: and had there been a particular certified by the proper officer precedent to the grant, yet that should not now stand in competition, or jostle with the patent.

Lord Chief Baron Mountague said, he took it that the allegations in the information were fully proved, and that the King's evidence was much stronger than the defendant's; that the proposal mentioned nothing of services, but seemed to imply an adequate consideration; and the over-value being proved, he took that to be a false suggestion: and the over-value in some measure appeared from the defendant's tenaciousness. That the warrant was of an unusual and unheard-of nature; being directed to the *Chancellor* of the *Duchy*, and countersigned by himself; no privy seal or signet to it; here were no particulars from the *auditor*, no certificate from the surveyor, and the patent passed not gradually but *per saltum;* and he looked upon the over-value to have been the occasion of the secrecy, huddle and haste that had been used in passing this grant: and as to the objection, that there was no precedent of any such suit brought into this court; he said, this court creates precedents. (1) It is not long since bills to foreclose redemptions were first brought in use, (2)

(1) Vide *King* v. *Carex*, ante p. 54. (2) *Anon.* 1 Salk. 404.

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and the court must find out new ways to obviate the mischiefs of the age, for *crescit in orbe dolus;* and he took it that no *scire fac.* would lie in this case, the deceit not appearing in the body of the grant; and therefore thought his *Lordship* might justly decree a re-conveyance, and that the patent should be delivered up and cancelled: and he supposed care would be taken that the consideration should be restored.

Lord Chief Justice Jones said, the pleadings in the cause are very long, and the proofs voluminous, he would not therefore (having but an old decayed memory, and at this time wanting the use of hands which might in some measure supply that defect) take upon him to repeat all the circumstances of the case, but would in a few words deliver his opinion.

It is objected, that the subject matter of this suit is not proper by an *English* bill; that is not the proper method, they say, for avoiding letters patent. I take it, that a *scire fac.* will not lie in this case, or if it would, yet the deceit appears not in the body of the patent; and therefore a *scire fac.* will not reach it. (1) The value is not mentioned in the patent, and shall there be no way then where the King is deceived for his Majesty to be relieved? That would be to put him in a worse condition than a subject. But there is no precedent they say; he was sorry that Colonel *Vernon*, an honest gentleman, and of known loyalty, should be the occasion of making a precedent of this nature; but there was a time when all precedents began. Had the patent been intended a gift or gratuity only to the defendant *Vernon* for his services, there no fraud or surprize would have been collected from the over-value; but there being money to be paid for the grant, and that being the consideration which was regarded, as well as the defendant's services and sufferings, he therefore thought the excessive over-value in this case argued a plain surprize, if not a fraud. But it is objected, what shall be said to be such an over-value as will avoid a patent,

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and what not? My brother *Pemberton*, in arguing for the defendant, admitted that an excessive and outrageous value

(1) *Sed quære.* For in the cases in which it hath been adjudged *scire facias* would lie for repealing a patent, it should seem the deceit could not appear in the body of the patent, 4 Inst. 88. *Anon.* Dy. 269 a. And it appears that if the patent be void in itself, *non concessit* may be pleaded to it without a *scire facias* to repeal it, 2 Rol. 191. pl. 20.

might do it; and the court is to judge what is excessive and outrageous, and what not. He thought the plaintiff's proofs as to the values were much stronger and more full and exact than the defendant's; but yet had there been no unfair practice or artifice in the case, he should have moved my *Lord Chancellor* that an issue at law might have been directed, for ascertaining the value; but as this case was a patent huddled up in haste by an unusual sort of warrant, all offices passed by, no money at the time paid, but only a note given to the *Chancellor* of the *Duchy*, who was not the proper officer to receive the moneys; and here before the grant was perfected, (that is to say, before livery) there was a kind of a prohibition, and Mr. *Curson* was desired not to receive the moneys. Therefore upon the whole matter he thought his lordship might very well decree the patent to be delivered up and cancelled, and order a reconveyance to be made.

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Lord Chancellor thanked their lordships for their assistance in this cause, which was a cause of very great consequence, and was glad to find their lordships concurred so entirely in opinion with him; for besides the apprehension he had of his own inability, he had formerly heard this matter at the council board, and knew many things of his own knowledge that might have had some influence on his judgment; but now he was fully convinced that he ought to decree the patent to be delivered up. That Colonel *Vernon* has been very loyal, and that his services and sufferings for the crown have been considerable, must be admitted; it is proved by persons of great quality, that were concerned with him; but after all, that is but every subject's duty; and by the way he said, he must take notice that Colonel *Vernon* had before this time tasted of the King's bounty both in *England* and in *Ireland;* that this patent was not designed or intended to be a bounty or reward to Colonel *Vernon*, but was intended a purchase, and nothing else: for here, as [390] soon as ever the late King was informed of the over-value, he gave directions for setting aside this patent, which answered the objection of a succeeding king's avoiding his predecessor's grants, for here the prosecution was begun in the time of his late majesty. There is nothing of services suggested in the petition, nor any thing of it mentioned in the patent, and the words *ex mero motu* are only words of course, &c.

The first question then is, whether this court upon an

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English bill may in any case decree letters patent to be delivered up and cancelled; and he was clear of opinion, that had the patent passed ever so regularly, that yet this court might have decreed it to be delivered up. Fraudulent contracts and bargains are properly relievable here; the precedents are common. In the case of *Coleby* and *Smith*, (1) a fine, conveyance, release, articles, and several other deeds, made at a considerable distance of time one after another, were all set aside. (2) But it is asked, how can a matter of record be vacated by *English* bill? Does not this court every day decree satisfaction to be acknowledged on judgments and the like? and he said, that the patent in question was not matter of record, for the estate passed by livery, and therefore he thought a *scire fac.* would not lie in this case, because it is no record; for had the patent been removed by a *scire fac.* into this court that would not have made the patent a record, which was no record before: but in case a *scire fac.* would have lain, he thought there was sufficient ground to avoid these letters patent upon a *scire fac.* because there was no sufficient warrant for the passing of the grant; there being neither privy seal, nor signet to it; (3) and to say no worse, the *Chancellor* of the *Duchy* was at least surprised in the passing of this grant, and had gone beyond all manner of method. A report ought to have come back to the secretary's office, from which the warrant was made; here the warrant for passing the grant is countersigned by the *Chancellor* himself, who is to pass it; the report and the warrant for the grant are both wrote by *Vernon's* man; and here is a warrant to *Tench* to make out particulars on the same day that the report bears date; and the warrant is but the 19th of *November*, and the patent is engrossed and passed the 21st of *November*; in so short a time, that it was not possible to be done after the warrant passed; but all things were prepared and in a readiness for a surprise; and here before livery, and before the money came to *Curson's* hands, there is a countermand and a caveat entered; and though from the Lord *Dartmouth*, yet that is not material: and the King, had he known how the matter stood (but that was kept secret) might have countermanded the livery; and then the patent had been invalid.

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(1) Ante p. 203.

(2) But there must always be manifest proof of fraud, *Bath* v. *Mountague's* Case, 3 Ch. Ca. 85, ibid. 114.

(3) Vide stat. 27 Hen. VIII. cap. 11.

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And here the *Chancellor* is secretary, is treasurer, countersigns a warrant to himself, is every thing: What authority had he to receive the money? they might as well have paid it to any body they had met; and before it came to *Curson's* hands, he is told the King was displeased with the grant, and desired to forbear receiving of it: so that in truth here is no money paid at all. And then the over-value is excessive in this case: it is fully proved, (and he said, he knew it) that Mr. *Harbord* offered to give as much as the particular comes to, and so did other gentlemen of the country; and any one that knows Mr. *Harbord* will easily believe, that he would not knowingly buy an ill bargain, or sacrifice so many thousand pounds out of any pique to Colonel *Vernon:* and the greatness of extent and dependencies must be made an ingredient in this case. He said, he could wish the crown had not parted with so many flowers, as it hath already done, and then he was persuaded there would not have been so many rebellions as there have been: and though Colonel *Vernon* was an honest gentleman and of good quality, the honour of *Tutbury* is of that vast extent, and so many noblemen hold of it, that it is not fitting for a person of his degree; and therefore decreed the patent to be delivered up and cancelled, and that Colonel *Vernon* should procure his trustees to reconvey; and said, care would be taken that the money should be repaid: but that matter would be most proper upon a petition to the King.

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But *note.* Here was no direction for conveying back of *Sheerness* to *Vernon,* nor any satisfaction to be made for it. And afterwards by a bill exhibited by *Brown* against *Vernon* and *Curson* for the 7,000*l.* *Vernon,* who refused to give any obedience to the decree, dying before he answered that bill, *Brown* set up an administrator to him, who put in an answer, and *Brown* obtained the decree, against *Curson* for the 7,000*l.* (1)

(1) By the Register's Book it appears that 400*l.* being the consideration to be paid by the crown for the premises at *Sheerness*, the same together with interest from the time of the conveyance of the said premises to the crown was directed by the decree to be repaid to the defendants, after deducting thereout such sums as the said defendants, or any of them, had received by or out of the premises since the patent, or which in case no grant had been made, would have been payable to the crown. Reg. Lib. 1685. A. fol. 388.

Case 364.
March, 1685.
Lord Chancellor.

DANCER *versus* EVETT.

Eq.Ca.Ab. 119, pl. 8. S. C.

Copyholder in fee takes an infranchisement of his copyhold in the name of a trustee, and devises the land to his younger son, who sells to *A.* The heir at law of the copyholder recovers in ejectment, and *A.* brings his bill, and is decreed to hold and enjoy against the heir.

THE case upon a bill of review was this. A copyholder in fee agreed with the lord to infranchise his copyhold, and took the conveyance from the lord in the name of a trustee, and then devised the same lands to a younger son, from whom the now defendant purchased them. The now plaintiff, who was heir at law of the copyholder, recovered the lands in ejectment (as he might do upon his ancestor's admittance) and thereupon the now defendant brought his bill against the heir to be relieved in equity, and insisted that the estate purchased of the lord was purely an estate in equity according to the case of *Smith* and *Murrin*, reported amongst the Lord *Coke's* copyhold cases (*fo.* 24 *b.*) (1) and that the disposition of the fee to the purchaser was a disposition of the whole estate that the copyholder had either in law or equity: and the Lord *Chancellor Nottingham*, who heard the cause, was of that opinion, and decreed that the purchaser should hold and enjoy against the heir of the copyholder, who now brought his bill of review to reverse the decree, and insisted that his ancestor did not alien the copyhold. (2)

The defendant, who was plaintiff in the original cause pleaded the decree, and insisted by way of demurrer, there
[393] was no error in it; and the *Lord Chancellor* was of that opinion, and allowed the demurrer.

(1) *Smith* v. *Murrell*, 4 Rep. 24 *b.* 31 *a.*
(2) *Dunn* v. *Green*, 3 P. Wms. 9. *Parker* v. *Turner*, post 393. 458.

Case 364.
March, 1685.
Lord Chancellor.

PARKER *versus* TURNER.

Eq.Ca.Ab. 119, pl. 7.
2 Ch. Ca. 174, S. C.

A. B. tenant in tail of a copyhold remainder to himself in fee, purchases the freehold of the lord, and then sells to *J. S.* and dies; and after thirty years possession, the son of *A B.* sets up a title as issue in tail. Purchaser decreed to hold against the issue in tail. *Post Case* 434.

A PERSON being tenant in tail male of a copyhold estate, remainder to himself in fee, purchased the freehold of the copyhold from the lord, and then for a full value bargains and sells the whole estate, which was quietly enjoyed under the purchase thirty years. The tenant to the purchaser being a woman, and the copyholder being dead, married his

son, who being thus got into possession set up his title as issue in tail: the plaintiff who claimed under the purchaser, brought an ejectment, and a special verdict was found at law; but before that was argued he brought his bill here for a decree to hold against the issue in tail, and the defendant pleaded his title.

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The *Lord Chancellor* declared he was of opinion that the purchaser of the freehold should attract the other estate, which was but at will; however took time to consider of it, and afterwards did decree it so accordingly, and that the purchaser should enjoy against the issue in tail.

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TERMINO PASCHÆ,

2 *Jacobi II.* 1686.

IN CURIA CANCELLARIÆ.

TALBOT *versus* BRADDIL.

Case 365.

26 *Aprilis. In Court. Lord Chancellor.*

A. in 1657, conveys to *B.* subject to redemption on payment of 380*l.* in 1688, and possession is immediately delivered. Redemption decreed and an account of profits, before the day of payment in the proviso.

THOSE under whom the plaintiff claims, in the year 1657, conveyed the estate in question, being part in possession and other part leased out for lives, unto the defendant and her heirs, and this was in consideration of 320*l.* paid, and a reservation of 5*s. per ann.*; possession is delivered immediately, but there is a proviso in the deed that on payment of 380*l.* in the year 1688, the estate should be redeemed or reconveyed. It appeared in the cause that the estate in possession at the time of the conveyance was but 15*l. per ann.* that the 5*s.* rent had been always paid: but two old lives happening to die within some few years after the conveyance, the estate became 45*l. per ann.*, and the plaintiff's bill was now to redeem.

This cause had been heard by the Lord Keeper *North*, and a redemption decreed with an account of profits, (1) and

(1) Ante p. 183.

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the Master had reported the defendant overpaid; and the cause came now to be reheard.

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It was insisted for the plaintiff, that this was a special bargain and agreement of the parties, that ought to be binding; and that the estate was not redeemable till 88; and that then there ought to be no account of profits, but 380*l.* ought to be paid for the redemption.

1*st.* That the *lien* in a mortgage ought to be equal; where one side cannot foreclose, the other ought not to redeem: and in this case the plaintiff could not have foreclosed the defendant till 88.

2*ndly.* That an account of profits was not reasonable in this case; *first*, because there was a contingency in the case; as the lives happened to die soon, so they might have lived long, and then the defendant had lost good part of his interest; and *secondly*, it is usual and common in *Welch* mortgages to deliver the possession immediately, and to agree to set the profits against the interest: and such agreements have always been allowed good in this court. (1)

For the defendant it was insisted, that this court had always favoured redemptions; (2) and if the court should suffer redemptions to be fettered by such clauses, scriveners would be inserting them in every mortgage, and by that means worm young heirs out of their estates: and it was said, that the rule where one side cannot redeem, the other cannot foreclose, does not hold in all cases; for if I lend 100*l.* upon a mortgage with a proviso to redeem on payment of 112*l.* at the end of two years, there one side cannot foreclose till the end of two years; but if the mortgagor comes at the end of the first year, and offers to pay the 112*l.* he shall be admitted to the redemption.

The court inclined that the plaintiff should redeem, but proposed, that whereas the Master had reported the defendant to be 60*l.* over-paid, and the defendant had since that received two years profits, the plaintiff should wave the benefit of the account, and the defendant forthwith deliver

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possession; and gave the defendant a week's time to consider of this proposition. (3)

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(1) Vide *Fulthrope* v. *Foster*, post 477. *Manlove* v. *Ball*, post 2 vol. 84. But as to the practice of setting the profits against the interest in Welch mortgages, if the value is excessive, the court, notwithstanding the agreement, will decree an account, vide *Fulthrope* v. *Foster*, ub. sup.

(2) *Newcomb* v. *Bonham*, ante p. 8.

(3) And in case the defendant consented on such terms to deliver possession to plaintiff, then to have the 40*s.*

which he had deposited with the Register, on his filing exceptions to the Master's report, by which the 60*l.* was reported over-paid, returned to him, otherwise the former decree to stand. Reg. Lib. 1685. B. fol. 474.

OGLANDER *versus* BASTON.

Case 366.

27 Aprilis. In Court. Lord Chancellor.

Eq. Ca. Ab. 69, pl. 7. S. C.

A sum of money awarded to the husband, which he is entitled to in right of his wife, will go to his executor, and will not survive to his wife.

THE plaintiff being intitled to the surplus of the personal estate of *I. S.* as residuary legatee, and a difference arising between the plaintiff's husband and the executor touching the *quantum* of this *residuum*, it was referred to arbitration, and an award is made that the executor of *I. S.* should pay 1,500*l.* to the plaintiff's husband; but before any thing further was done, the husband dies, and this bill was now brought by the wife against the executor of her husband, and also against the executor of *I. S.* and the sole question was, who had the right to this 1,500*l.* whether the executor of the husband, or whether it should survive to the wife.

Lord Chancellor. The award is a sort of judgment, and the arbitrator having awarded that the 1,500*l.* should be paid to the husband, *that* has changed the property, and vested it in the husband. (1)

The case of *Norden* and *Levet* (2) was cited, where the husband had a term in right of his wife, and only took a covenant for further assurance; and it was adjudged, that altered the property. (3) On the other side it was said, that

(1) Vide *Anon.* Com. Rep. 31. Sed vide *Bond* v. *Simmons*, 3 Atk. 21, where said by *Lord Hardwicke*, Chan. that if at law husband had recovered a judgment for debt of the wife, (i. e. debt accruing before the marriage, and where the action shall survive to the wife she must be joined in the action, *Frosdick* v. *Sterling*, 2 Mod. 269.) and had died before execution, the wife would have been entitled and not the husband's executors.

(2) Sir Thomas Jones Rep. 80.

(3) So where wife entitled to mortgage in fee, and husband after marriage assigns his interest in the mortgage to trustees, and articles with them to call in the money and lay it out, adjudged that it survived to the wife notwithstanding the articles, *Burnett* v. *Kinnaston*, post 2 vol. 401. As to the acts whereby husband may alter the property of wife in her choses in action, vide *Squib* v. *Wyn*, 1 P. Wms. 378. and cases cited there. *Lord Carteret* v. *Paschal*, 3 P. Wms. 200. *Bates* v. *Dandy*, 2 Atk. 207. *Hawkins* v. *Obyn*, ibid. 549. [See also *Hornsby* v. *Lee*, 2 Madd. 16. *Nash* v. *Nash*, 2 Madd. 133. *Purdew* v. *Jackson*, 1 Russell, 1, and cases there cited.] Bill brought by husband and wife, and husband dies, pending the suit, property not altered, and survives to wife, *Anon.* 3 Atk. 726. *Coppin* v. ——, 2 P. Wms. 496.

OGLANDER v. BASTON.

A man may sue alone without his wife for a debt due to her by bond. But if he joins the wife in the action and recovers judgment and dies, the judgment will survive to her.

if the husband grants a rent-charge out of a lease, which he has in the right of his wife, that does not change the property; but if the husband makes a demise of the term itself, though but for a fortnight, that will alter the property. (1)

Per Cur'. If there be a bond debt due to the wife, the husband may sue alone without joining his wife; (2) but in case the wife was joined in the action, and judgment is recovered, the judgment will survive to the wife; (3) but not being joined, the interest does vest by the judgment in the husband, and will go to his executor. (4)

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(1) *Quære tamen*, If in that case, the reversion does not remain in the wife, vide 1 Inst. 46 b. [*Sym's* Case, Cro. Eliz. 33.] Though if the husband make a lease of part, reserving rent, and dies, the executors of the husband shall have the rent, 1 Inst. ub. sup.

(2) And where debt accrues after marriage, action may be maintained in his own name alone. *Hilliard* & *Ux.* v. *Hambridge*, Alleyn 36. *Blackburn* & *Ux.* v. *Greaves*, 2 Lev. 107. [*Phillis-kirk* v. *Pluckwell*, 2 M. & S. 393.] Et vide *Howell* v. *Maine*, 3 Lev. 403. So where on a judgment obtained by baron and feme, the baron alone sued a *sci. fac.* he had judgment: cited by Powell Just. ibid. Contra *Clerk* v. *Lord Angier*, arg. 1 Ch. Ca. 41. Eq. Ca. Ab. 64, pl. 1. Et vide *Holloway* v. *Lightbourn*, in Chan. Pasch. 12 Geo. II. 1739. *Willy* v. *Thomas*, in the Exchequer, Mich. 3 Geo. II. 1729. [If the dictum in the principal case is intended to apply to a bond given to the wife *dum sola*, its authority seems doubtful; see Selwyn's Ni. Pri. tit. Baron and Feme, div. 3. *Macneilage* v. *Holloway*, 1 B. & A. 218.]

(3) *Garforth* v. *Bradley*, 2 Vez. 677., and cases cited in not. there. So as to the benefit of a decree, *Nanney* v. *Martin*, 1 Ch. Ca. 27. But in general where the husband settles his estate on his wife in consideration of her fortune, the wife's portion, though choses in action, and though there is no particular agreement, is considered as purchased by the husband, and shall go to his executors, *Meredith* v. *Wynn*, Eq. Ca. Ab. 70. pl. 15. But if the settlement be only in consideration of her then portion or fortune, without reference to what comes afterwards, if that after fortune consist of choses in action, and the husband does not reduce them into possession, they will survive to the wife in equity, as well as by the rule of law, *Garforth* v. *Bradley*, ub. sup. So a settlement must express or clearly import to be a purchase of all the wife's property, *Packer* v. *Windham*, Pre. Ch. 412. And according to the modern cases it is established that the settlement to be the purchase of the wife's fortune, must either express to be in consideration thereof, or the contents of that settlement must plainly import it, *Druce* v. *Denison*, 6 Ves. 395.

(4) *Scire facias* by baron and feme upon a judgment recovered by the feme while sole, and after execution awarded the feme dies, it survives to the husband, *Woodyer* v. *Gresham*, Salk. 116.

JAUNCY *versus* SEALEY.

Case 367.

29 *Aprilis.* *In Court.* *Lord Chancellor.*

A. died beyond sea and made a nuncupative will. *B.* took administration here, and brought his bill for a discovery of the supposed intestate's personal estate.

THE plaintiff, as administrator to *J. S.* who died at *Naples*, brought his bill to have a discovery of the intestate's personal estate. The defendant pleaded, that the supposed intestate had made a nuncupative will in the presence of *nine* or more credible witnesses, and thereby made the defendant executor, and that he (the defendant) had proved the will according to the custom of the country where the testator died; and denied he had left any estate, but what was at *Naples*.

The defendant pleaded the will and that he was executor, and that *A.* left no assets, but what were beyond sea. Plea allowed. A will of a personal estate which lies in a foreign country may be proved there, and need not be proved here.

The Court allowed the plea, and said the testator having left no estate in *England*, it was not necessary that the will should be proved here; no more, than if a man died and left an estate in *Scotland*. (1)

(1) Reg. Lib. 1685. A. fol. 564. 11 Vin. Ab. 59. 69. But if a will be made in a foreign country, disposing of goods in *England*, it must be proved here, 11 Vin. Ab. 58. *Tourton* v. *Flower*, 3 P. Wms. 369.

FOWKE *versus* HUNT.

Case 368.

Eq. Ca.Ab.154, (C) pl. 3. S. C.

Grand-children not entitled to a customary share of a freeman's personal estate by the custom of *London*.

A CITIZEN of *London* dies leaving a widow, and no children, but has several grand-children living at the time of his death; and the question was whether they were within the custom of the city of *London* or not. The *Lord Chancellor* took time to consider of the case; and having consulted the *Recorder* and several of the *Aldermen*, this day delivered his opinion, that the grand-children were not within the custom of the city of *London*. (1)

(1) So *Northey* v. *Burbage*, Pre. Chan. 470. 1 P. Wms. 341. S. C. Salk. 426. *Anon.* 2 Show. 467. But note an after-born child shall come in with the rest of the children for a customary share of a freeman of *London's* personal estate, *Walsam* v. *Skinner*, Eq. Ca. Ab. 124, pl. 4. Et vide *Fowke* v. *Lewen*, ante p. 88.

Case 369. CLOBERY *versus* SYMONDS.

Eodem die. Lord Chancellor.

2 Ch. Rep. 392.

Conuzee of a judgment extends the lands of the conuzor upon an elegit, conuzor grants over the reversion without notice of the judgment and extent; the grantee may bring a bill to redeem the conuzee, though at a great distance of time, and though a former bill for the same purpose was dismissed.

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THE plaintiff's bill was to redeem lands, which in the first year of King *Charles* the *First* were extended upon a judgment for 400*l.* the plaintiff deriving his* title under one, who purchased these lands from the conusor of this judgment without notice. The defendant claimed part of the lands by assignment under the conuzee of the judgment, and pleaded that so long ago as in the year , *J. S.* under whom the plaintiff claims, brought his bill in this court to redeem: that the cause was heard, and an account directed to be taken by one of the Masters of this court, and it was ordered that the plaintiff should within six months after the report made pay the money reported due, or in default thereof the bill was to stand absolutely dismissed: that the Master made his report accordingly, and that *J. S.* did not pay the money reported due, within the time limited by the decretal order; and thereupon the bill was dismissed: and that *J. S.* lived above twenty years afterwards, and never sought any redemption; and averred that the profits of the lands were not sufficient to pay the interest of the money reported due; and that since this dismission he had purchased part of the land for a valuable consideration, and demanded the judgment of the court, whether after this length of time and proceedings aforesaid the plaintiff should be admitted to a redemption.

The Court over-ruled the plea, because under the extent the defendant has at law an interest only *quousque* he is satisfied; and the dismission here will not give him a greater estate; and it would be absurd to deny a redemption; for the interest under the extent was but a chattel interest, and the consequence of denying a redemption would be, that lands of inheritance should not descend; but to the world's end go in a course of administration. (1)

(1) Reg. Lib. 1685. A. fol. 899. Et vide *Newcomb* v. *Bonham*, ante p. 8. *Talbot* v. *Braddil*, ante p. 394. And *quære* whether, after an estate has been held under an extent for a long time, and has gone through several hands, upon a bill to redeem, the defendant shall account otherwise than at the extended value? Vide *Poole* v. *Guise*, post 468.

SMITHIER *versus* LEWIS.

Case 370.

Eodem die. In Court. Lord Chancellor.

Eq. Ca. Ab. 77, pl. 13. S. C.

Plaintiff having recovered judgment at law for 1,400*l.* against *J. S.* brings a bill charging that *J. S.* had conveyed his estate to trustees and had lent 1,000*l.* to *A.* in *B.'s* name, and praying that this might be liable to plaintiff's debt.

THE plaintiff having obtained a judgment against the defendant on a bond of 1,400*l.* penalty for payment of 700*l.* and interest, brought his bill, and setting forth * this judgment, complained, that the defendant to defraud him of the benefit of it, had assigned his estate to trustees, that he had lent 1,200*l.* to *Rowe* and *Green*, who were since become bankrupts, in the name of one *Elton*, but that it was in trust for the defendant *Lewis*, and therefore prayed a discovery of this matter, and that the plaintiff might come in under the statute of bankruptcy for this 1,200*l.* debt, and that the Commissioners might not make any distribution, till this matter was determined.

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Defendant demurs, for that in his lifetime he was not bound to discover his personal estate, and demurrer over-ruled. *See the next case.*

The defendant demurred, for that he in his lifetime was not bound to discover his personal estate; and for that this bill was in the nature of a foreign attachment, which the practice of this court did not admit or countenance.

Per Cur'. Over-rule the demurrer. (1)

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(1) On the 23d April an order was made that unless answer in a week (the defendant having been brought to the bar of the court three times by Hab. Cor. to shew cause why he should not answer) he should be turned over to the common side of the Fleet prison, the defendant then put in a frivolous plea and demurrer, which was over-ruled. Reg. Lib. 1685. B. fol. 449. And now an order was made that unless answer in four days, the bill should be taken *pro confesso*. Reg. Lib. 1685. B. fol. 435. So where bill amended after answer, if the amended bill is not answered, plaintiff is entitled to a decree, that the bill be taken *pro confesso* generally, *Joplin* v. *Stuart*, 4 Ves. 619. Et vide *Neale* v. *Morris*, 5 Ves. 1. *Bishop of Winchester* v. *Beavor*, ibid. 113. stat. 5 Geo. II. cap. 25. sect. 8.

ANGELL *versus* DRAPER.

Case 371.

Eodem die. In Court. Lord Chancellor.

Eq. Ca. Ab. 77, pl. 14. S. C. *A.* obtains judgment against *B.* and brings a bill against *C.* for an account and discovery of goods of *B.* which *C.* had got into his hands.

THE bill was, that the plaintiff had obtained judgment against *J. S.* for 100*l.* and that the defendant upon pretence

ANGELL v. DRAPER.

of a debt due to himself, and to prevent the plaintiff's having the benefit of his judgment, had got goods of *J. S.* of great value into his hands, sufficient to satisfy his debt with a great overplus; and prayed an account and discovery of these goods.

Defendant demurred, because the plaintiff had not alleged he had taken out execution. Demurrer allowed. *See the foregoing case.*

The defendant demurred, because the plaintiff had not alleged that he had sued out execution, and had actually taken out a *fieri fac.*; for until he had so done, the goods were not bound by the judgment, nor the plaintiff entitled to a discovery or account thereof.

Per Cur'. Allow the demurrer: the plaintiff ought actually to have sued out execution before he had brought his bill. (1)

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(1) Reg. Lib. 1685. A. fol. 479. [*Balch* v. *Wastall*, 1 P. Wms. 444.] So *Shirley* v. *Watts*, 3 Atk. 200, on a bill by judgment creditors to redeem mortgage and bond creditor. There is however a distinction taken on this head in respect of bills of discovery between those for a general and indefinite discovery, and those for a particular discovery, see *Taylor* v. *Hill*, Mich. 1705. Eq. Ca. Ab. 132, pl. 15, where judgment creditor of *A.* not having sued out execution, supposing some particular effects to be in the hands of *J. S.* filed his bill, and on the ground of its being for a discovery of particular things, demurrer over-ruled. In *Manningham* v. *Lord Bolingbroke*, East. 1777, in Chan. demurrer was, that no elegit had been sued out, and demurrer over-ruled. *Leith* v. *Pope*, on demurrer, 17th July, 1780. *Phipps* v. *Bowater*, 6th Feb. 1783, before *Thurlow*, Chan. Bill by judgment creditors, elegit sued out, but not of any effect, on account of prior incumbrances. Sale of estate prayed, and receiver appointed, *Davidson* v. *Foley*, 8th March, 1792, Lincoln's Inn Hall.

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Case 372.

30 *Aprilis. In Court. Lord Chancellor.*

BURCH *versus* MAYPOWDER.

2 Show. 67 S. C. An attachment sued out in the time of King *Charles* the *Second*, and executed three days after the King's demise, but before notice of his death, adjudged to be well executed, and the proceedings thereon regular.

THE question upon the Master's special report was, whether an attachment that was sued out in the time of the late *King*, and was executed at *Exeter* three days after the *King's* demise, but before any notice of the *King's* demise, was well executed or not.

The objection taken to it was, that though the execution of the attachment before notice of the *King's* demise was good, and would excuse the officer that did it; yet the return of the *cepi corpus*, which was made after notice of the *King's* demise, was nought; and the plaintiff having upon the *cepi*

corpus returned got a messenger and proceeded for the contempt, *that* was irregular.

BURCH *v.* MAYPOWDER.

But the Court, on reading the case of *Crew* and *Vernon*, in *Cro. Car.* 97, and a precedent in the Lord Keeper *North's* time, betwixt *Vaughan* and *Bampfield*, was of opinion, that the attachment was well executed and also well returned, and that the proceeding upon it since was good. (1)

(1) Reg. Lib. 1685. A. fol. 536. And by stat. 1 Ann. st. 1. cap. 8. sec. 5. it is enacted, that no proceedings in any court of equity shall be determined by the demise of any King or Queen of this realm. Et vide *Anon.* ante 300.

HOLLEY *versus* WEEDON.

Case 373.

4 *Mich.* *In Court.*

2 Ch. Ca. 175. S. C.

Action of debt brought against an heir upon the bond of his ancestor, who pleads a false plea and the plaintiff has a verdict; the defendant dies before the day in *Bank*, and devises his lands to *I. S.*; the obligee brings a bill against the devisee to be paid his debt. Bill dismissed.

ONE *Thomas Castle* became bound to the plaintiff for payment of 100*l.* and interest, and dies; and some land, of which he was seized in fee, descended to *Jane* his daughter and heir. *Jane* died, and the land descended to *Robert*, her uncle and heir. The plaintiff sues out an *original* against *Robert*, who pleaded a false plea, and the plaintiff had a verdict at law for recovery of his debt: but *Robert* died before the day in *Bank*, having devised his lands to the defendant his son.

The end of this bill was to affect the lands in the hands of the defendant with this debt recovered at law, but rendered fruitless by the hand of God: and the case of *Parker* and *Dee* was cited as a precedent near this case.

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Lord Chancellor. Dismiss the bill; there is no colour of equity in the case, unless you will have it that *Robert* died maliciously before the day in *Bank*, on purpose to defeat the plaintiff of his debt.

See St. 17 *Car.* 2. cap. 18. & 1 *Jac.* 2. cap. 17. *Also see St.* 3 & 4 *Wm. & Mar.* cap. 14.

DE

TERM. S. TRINITATIS,

2 *Jacobi II.* 1686.

IN CURIA CANCELLARIÆ.

Case 374.

16 *Junii.*

In Court.

Eq.Ca.Ab. 105, pl. 1. S. C.

Post Case 405.

COM. WINCHELSEA *versus* WENTWORTH & Al.

Lands are limited to the second son in fee, provided that if the eldest son die without issue the second son should, within six months after such death of the eldest son, pay 1,500*l.* to the sister; or in default thereof, the lands should go to the sister and her heirs. The eldest son dies without issue. The sister dies within the six months; her heir, and not her executor, shall have the benefit of this devise over.

THE lands in question were limited to *John* the second son; subject to a proviso that if his elder brother should die without issue, *John* should pay the Lady *Katherine* 1,500*l.* within six months after the death of the elder brother; or in default thereof, that the land should go to the Lady *Katherine* and her heirs. The elder brother dies without issue, and within *three* months afterwards, being before the time for payment of the 1,500*l.* the Lady *Katherine* died, and *John* refused to pay the 1,500*l.*

The principal question was between the heir and executor of the Lady *Katherine; viz.* whether this should be taken as a real estate and go to the heir of the Lady *Katherine*, or be looked on as a personal estate, and only a security for money, she dying before the time of payment, and go to her executor.

The *Lord Chancellor* directed a case should be stated by a Master for the judgment of the court.

[403] In arguing of this case, were cited the case of *Pitcarne* and ———, and *Wallis* and *Grimes*, where the court had relieved in like cases, against the limitation over, on payment of the money, though after the day.

But the *Lord Chancellor* declared his opinion, that the court ought not to relieve in such cases, for that is to

destroy the known and common difference between a limitation and condition. (1)

(1) It would form a treatise to shew by what words, in what particular cases, and under what circumstances a distinction has been held between conditions and conditional limitations. For the leading books and cases on this frequently important distinction vide *Pierce* v. *Jones*, Vent. 322. Bacon Abr. 1, p. 638. l. H. 2 Blackst. Comm. 155. 2 Woodes. 143. *Avelyn* v. *Ward*, 1 Vez. 423. *Hodgson* v. *Rawson*, ibid. 47. and the cases therein respectively referred to. From these cases the following consequences, as forming a general doctrine, seem to result. 1st. That there is a settled and known distinction between a limitation and a condition. 2nd. That the chief mark of that distinction is, that in the case of a conditional limitation, the estate is limited over to a stranger, and that estate expires and determines of itself, without any act (as entry or claim) to be done or made by him who hath the expectant interest, but that in the case of a condition its effect is to give title by the breach of it to the grantor, or those claiming under him in the reversion, and the estate does not determine or expire of itself, but advantage must be taken of the breach of it by the grantor, his heirs, or assigns. 3rd. That there are words that properly create or denote a condition, as distinct from a limitation. 4th. That there are cases in which, although there be express words of condition, they shall nevertheless be construed to be a limitation. [See also on this subject Butler, Co. Litt. 203 b. note (1) III.]

EARL of WINCHELSEA *versus* NORCLIFF & Al'.

Case 375.

Eodem die. In Court.

Eq. Ca. Ab. 262, pl. 4.
2 Ch. Ca. 367. S. C.
Post Case 410.

A GUARDIAN to an infant having a considerable sum of money in his hands, that was raised out of the infant's estate, lays out 2,500*l.* in a purchase taken in the name of *I. S.* for the benefit of the infant, if, when he came of age, he should agree thereto, and allow the trustees that money upon account. The infant dies under age.

The question was whether the heir of the infant should have this estate, or whether it should be looked on as a security for 2,500*l.* and go to the executors and administrators of the infant? As precedents for the heir were cited the cases of *Palmer* and *Allicot*, (1) and *Dennis* and

(1) *Palmer* v. *Allicock*, Skin. 212. 218. 3 Mod. 58. S. C. cited in *Gudgeon* v. *Ramsden*, post 2 vol. 274. Et vide *Lady Ann Fry's* Case, 1 Vent. 199. As to the later cases, vide *Embry* v. *Martins*, Amb. 230. For the distinction between condition, and the equity of this court to compel election, vide *Lady Cavan* v. *Pulteney*, 2 Ves. jun. 560. A condition not to be extended to a limitation over, *Holmes* v. *Craddock*, 3 Ves. 320. As to the operation of words of condition when standing alone and connected with the context, *Lane* v. *Goudge*, 9 Ves. 229.

EARL OF WINCHELSEA v. NORCLIFF.

Badd, (1) where a guardian buys in a mortgage on the infant's estate, and takes an assignment of it in the names of trustees.

The Court inclined to the heir, but referred this to be stated as a case by the Master. And in this case the court held, that where a person entitled to a share of an intestate's estate dies before distribution, and within the year, there was an interest vested, and that his share should go to his executor or administrator.

Vid. post Case 410.

In this case also the Court was of opinion, that where there is a brother of the whole blood to the intestate, and a

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sister of the half blood, the sister should have but half a share. (2)

But *note*.—The judgment in the cases of *Smith* and *Tracy*, and *Stapleton* and *Sherrard*, and the constant practice of the court, has been otherwise.

Note.—It has been since settled in the case of *Crooke* and *Watts*, (3) upon an appeal to the House of *Lords*, that the half blood should have a whole share, *viz*. equal with those of the whole blood.

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(1) Eq. Ca. Ab. 261, pl. 1. 1 Ch. Ca. 156. S. C.

(2) Reg. Lib. 1685. A. fol. 1026.

(3) Post 2 vol. 124. Show. Parl. Ca. 108. S. C. Et vide post 437. *Smith* v. *Tracy*, 1 Vent. 307. 317. 323. 1 Mod. 209. 2 Mod. 204. S. C. where previously to the decision in *Crooke* v. *Watts*, the question is much discussed.

Case 376.

CLYAT *versus* BATTESON.

30 *Junii*. *In Court*.

Eq. Ca. Ab. 117, pl. 3. S. C. Lands in mortgage devised to *A*. for life, remainder to *B*. in fee. *A*. takes an assignment of this mortgage in a trustee's name. *B*. may compel *A*. to contribute a third of the mortgage in respect of his estate for life. Otherwise if the tenant for life is dead, and a bill is brought against his executor.

LANDS in mortgage are devised to *A*. for life, remainder to *B*. and his heirs. *A*. enters and buys in the mortgage, taking an assignment in trustees' names, and dies. *B*. the remainder-man now prefers his bill against the defendant, the representative of *A*. to redeem the mortgage; and his counsel insisted, that he ought to pay but two-thirds of what was due on the mortgage, and the other third ought to be allowed by the defendant, by reason that the tenant for life enjoyed the profits during his life.

Per Cur'. Had you come to redeem in the lifetime of the

tenant for life, then he should have allowed a proportion of the money with respect to the value of the respective estates of the tenant for life and remainder-man; but he being now dead, and having enjoyed the estate but one year only, the defendant must make an allowance only for the time that *A.* enjoyed the estate. (1)

CLYAT v. BATTESON.

(1) Reg. Lib. 1685. A. fol. 759. This point does not appear in the Register's Book. Vide *Brent* v. *Best*, ante p. 69. and cases cited in not. there. 15 Viner 451. Tit. Mort. Et vide *Verney* v. *Verney*, Amb. 88. 1 Vez. 430. S. C., where said that the computation of tenant for life bearing one-third had formerly been considered by the court, and particularly by *Lord Macclesfield* to be a wrong rule, as being too low, and the rule was afterwards considered to be that the tenant for life should keep down the interest, like the devisee of a mortgaged estate, *White* v. *White*, 4 Ves. 33. Et vide *Countess of Shrewsbury* v. *Earl of Shrewsbury*, 1 Ves. jun. 233-4, S. P. But in the same case of *White* v. *White*, 9 Ves. 554, which came on upon appeal and where the subject is a good deal discussed, the doctrine promulgated by the court was, that tenant for life, in general cases, where he is bound to pay any thing beyond the interest, is bound to pay in proportion to the benefit he *de facto* takes under the transaction, and that the remainder-man ought also to pay with reference to his proportion of the benefit, ibid. 558. But note, in that case testator had provided a fund for renewal, and therefore no decree upon the point in question. [*Allen* v. *Backhouse*, 2 V. & B. 65. and see note (*z*) to *Addis* v. *Clement*, 2 P. Wms. 459. 6th. Ed.]

DE

TERM. S. MICHAELIS,

2 Jacobi II. 1686. [405]

IN CURIA CANCELLARIÆ.

The EARL of KILDARE *versus* SIR MORRICE EUSTACE & Al'.

Case 377.

8 *Novembris. In Court. Lord Chancellor.*

Post Case 398. 399. 404. 411. Eq. Ca. Ab. 133, pl. 4.

THE plaintiff's bill was to be relieved touching the trust of certain lands in *Ireland*. The defendants had appeared and answered the bill, and had not any way objected to the jurisdiction of this court: but the cause coming now to be

2 Ch. Ca. 188. S. C. Bill lies here to be relieved touching a trust of lands in *Ireland*, defendant being in *England*.

EARL OF KILDARE v. SIR M. EUSTACE.

heard, the *Lord Chancellor* objected, this court could not hold plea of lands in *Ireland.*

For the plaintiff it was urged, that he was proper for relief in this court by reason that both plaintiff and defendant were here in *England,* and that a court of equity does only *agere in personam;* its proceedings are to reform the conscience of the party, and if at any time a court of equity may be said to *agere in rem,* it is only in the case of *sequestration,* which is for the contempt of the party; and that therefore the defendant being served with a *subpœna* here, and living in *England,* this court had proper jurisdiction of the cause, though the land lies in *Ireland;* and the rather, [406] for that it was never yet pretended that there was any local action in equity: and they instanced for precedents the late cases of the Lord *Arglasse* and *Muschamp,* (1) and Lord *Arglasse* and *Pit,* and *Archer's* case, (2) and insisted that otherwise there would be a failure of justice, for the defendant living here could not be served with process issuing out of the *Chancery* in *Ireland.*

But the *Lord Chancellor* over-ruled the plaintiff's counsel, and said as to the cases of the Lord *Arglasse,* the fraudulent contracts were made here in *England;* and as to the present case there would be no failure of justice, for they might have a *subpœna* out of this court returnable in the *Chancery* of *Ireland;* (3) as in his own experience, in cases between master and 'prentice in the city of *London,* he had known *subpœnas* to have issued out of this court returnable in the *Mayor's* court in *London* for persons that lived out of the jurisdiction; and therefore pronounced the rule for the dismissing the bill: but at the importunity of the plaintiff's counsel gave them a week's time to search for precedents.(4)

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(1) Ante 75.

(2) Et vide *Barker* v. *Dormer,* 1 Show. 192.

(3) *Quære autem,* if the defendant will not appear, whether there can be any further proceeding upon it, and whether any attachment can be taken out? Vide post 420.

(4) Reg. Lib. 1686. A. fol. 30.

ELLIOT *versus* HELE.

Case 380.

10 *Novembris.*

Lord Chancellor.

2 Ch. Ca. 29. 87. Eq. Ca. Ab. 345, pl. 16. S. C.

Tenant in tail with power to make a jointure, in consideration of marriage, articles to make a jointure, and dies without issue and without making the jointure: the lands articled to wife dies; and her executrix brings a bill for an account of the profits of the be settled. Bill dismissed.

TENANT in tail with power to make a jointure of lands in the counties of *A. B.* and *C.* remainder in tail to *J. S.* marries and receives 3,000*l.* portion with his wife, and by articles before his marriage covenants to settle a jointure, but dies before any settlement was made; the wife dies, and her executrix brings the bill to have an account of the profits of the lands, which by the articles were covenanted to be settled in jointure, against the remainder-man, who had upon his marriage settled those lands upon his wife and her issue: but with notice of the power in the first tenant in tail to make a jointure.

The *Lord Chancellor* dismissed the bill, (1) there being no equity for the administratrix of the first jointress against the second and her issue, who was equally a purchaser with the first: and this power being a general power to make a jointure, and not said of what lands in particular, was not such a *lien* upon the lands as should affect a purchaser, though the power had been afterwards executed; much less where it was not executed at all: for as a man by such general power might make a jointure of 500*l. per ann.* so he might make a jointure of 50*l.* or 5*l. per ann.* And said there was a great difference between a defective execution of a power, and where the power was not executed at all. (2)

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(1) Reg. Lib. 1686. A. fol. 57, where the statement is very short, and contains nothing more than that the bill was to have satisfaction for what should have come to her, the jointress, if a settlement had been made according to *an agreement and bond of* 6,000*l.*

(2) Vide *Girling* v. *Lee*, ante p. 63. Where testator in his will refers to a power, but does not legally execute it, and has other estates to which the will can apply, the defect of the execution cannot be supplied, *Lowson* v. *Lowson*, 3 Bro. Ch. Rep. 272. But otherwise where he could not make the gift but by virtue of the power, ibid. So a covenant on a marriage settlement referring to a power, or to the estate on which the power attaches, is, it seems, in respect of the consideration, a sufficient indication of an intent to execute such power, *Fothergill* v. *Fothergill*, 2 Freem. 256. *Hollingshead* v. *Hollingshead*, cited *Coventry* v. *Coventry*, 2 P. Wms. 229. *Alford* v. *Alford*, cited ibid. *Coventry* v. *Coventry*, 2 P. Wms. 222, more fully reported at the end of *Francis's* Maxims in Equity. And reported also in 1 Str. 596, and 9 Mod. 12. But this court will not supply the non-execution of a power, *Tollett* v. *Tollett*, 2 P. Wms. 490. *Holmes* v. *Coghill*, 7 Ves. 499. 12 Ves. 206. *Brown* v. *Higgs*, 8 Ves. 570. [*Harrington* v. *Harte*, 1 Cox, 131. *Reid* v. *Shergold*, 10 Ves. 370.]

ELLIOT v. HELE. But then for the plaintiff it was insisted, that there were some fee-simple lands, which were devised over, and those lands in the hands of a voluntary devisee were as much

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But this is where a mere power; in the case of a power, partaking of the nature of a trust, this court will execute, 8 Ves. 574. Powell on Powers, 157, and for observations on this case p. 185. [See also *Harding* v. *Glyn*, 1 Atk. 469. *Peirson* v. *Garnett*, 2 Bro. Ch. Rep. 38, 226. *Crossling* v. *Crossling*, 2 Cox, 396. *Brown* v. *Higgs*, ub. sup. and 18 Ves. 192. *Cruwys* v. *Coleman*, 9 Ves. 319. *Gower* v. *Eyre*, Cooper, 156.] And further what circumstances shall be construed in equity to be a sufficient indication of an intent to execute a power, vide *Clifford* v. *Benlington*, post 2 vol. 379. *Smith* v. *Ashton*, 1 Ch. Ca. 264. *Bath* and *Montague's* Case, 3 Ch. Ca. 69, 93. Fonbl. Tr. on Equity, Book 1. ch. 4. sec. 25. And a power must be executed in order to create a charge, per *Lord Chief Baron*, *Bull* v. *Vardy*, in the Exchcq. 1 Ves. jun. 272. Nor does an interest, arising under a power, become the estate of the party until the power be executed, sic dict. *Eyre*, Lord Commissioner, *Blake* v. *Bunbury*, ibid. 525. But power of appointment does not prevent the interest vesting, subject to be devested, *Reade* v. *Reade*, 5 Ves. 748, and cases in not. there. Et vide *Earl of Uxbridge* v. *Bailey*, ibid. 499. And whenever parties have a power by deed to do a particular act, when done under the power, it is as if incorporated under the original deed when executed, ibid. 510. S. C. As to the execution of powers, it is clear that a power is apportionable, and therein differs from a condition at common law, which is not, *Edwards* v. *Slater*, Hard. 410, and that under circumstances, it may be executed at several times, and over different parts of the premises subjected thereto, as of revocation, *Woolston* v. *Woolston*, Blackst. Rep. 281. 2 Burr. 1136. S. C. And of appointing a fee, *Bovey* v. *Smith*, ante 85, and cases cited in not. there. And where the power is exceeded equity will correct the excess, and uphold the execution thereof, *so far as the power warrants*, *Robinson* v. *Hardcastle*, 2 Bro. Ch. Rep. 22, and cases there cited. *Crompe* v. *Barrow*, 4 Ves. 681. *Brudenell* v. *Elwes*, 7 Ves. 382. And may be good as to part, and bad as to part, ibid. So *Wilson* v. *Piggott*, 2 Ves. jun. 355. Et vide Powell on Powers, p. 344, et seq. So where power relates to real estate it may be executed *cy pres*, *Routledge* v. *Dorril*, ibid. 364. But that rule cannot be applied to personal property, ibid. And further as to the application of the doctrine of *cy pres* to the case of a settlement, vide *Brudenell* v. *Elwes*, ub. sup. As to what shall or shall not be considered as a good execution of a power, it is evident that must depend, in most cases, on nice circumstances, that can scarcely be drawn into precedent. In the case, however, of a power to sell or exchange, a partition in common was held to be a good execution, *Abel* v. *Heathcote*, 2 Ves. jun. 98. So a power to appoint land well executed by a charge, a power to charge including a power to sell, *Kenworthy* v. *Bate*, 6 Ves. 797. And as a general principle, it seems, that a power is held to be not well executed by general words in a will, *Langham* v. *Nenny*, 3 Ves. 467. *Croft* v. *Slee*, 4 Ves. 60, and cases cited there respectively. *Roach* v. *Haynes*, 8 Ves. 588. But a direct reference to the power is not necessary; the intention, however, must distinctly point to the subject of it, *Bennett* v. *Aburrow*, 8 Ves. 609, 16, though formerly otherwise, ibid. Nor will the court look into the circumstances of the property, where a will considered as no execution, *Nannock* v. *Horton*, 7 Ves. 391. And a power not executed is not assets, ibid. As to a power of appointment over a sum of money being assets, vide *George* v. *Milbanke*, 9 Ves. 190. As to the particular jurisdiction of a

bound by those articles, as if they had remained in the hands of the heir; as where a trustee makes a voluntary conveyance, the feoffee, according to the resolution in *Chudleigh's* case before the statute of Uses, stood seized to the same uses; and the law is the same of a trust, which is not executed by the statute, at this day.

ELLIOT v. HILL.

court of equity to supply defects in the execution of a power, vide *Butcher* v. *Butcher*, 9 Ves. 394. [*Bramhall* v. *Hall*, Amb. 467. 2 Eden, 220. *Jackson* v. *Jackson*, 4 Bro. Ch. Rep. 462. *Wykham* v. *Wykham*, 18 Ves. 415. *Shannon* v. *Bradstreet*, 1 Sch. & L. 52. *Blake* v. *Marnell*, 2 Ba. & Be. 35. 4 Dow, 248. *Moodie* v. *Reid*, 1 Madd. 516.] And as to illusory appointments under a power, vide *Gibson* v. *Kinven*, ante 66, and cases cited in note there, *Vanderzee* v. *Aclom*, 4 Ves. 771. *Wollen* v. *Tanner*, 5 Ves. 218. *Spencer* v. *Spencer*, ibid. 362. *Long* v. *Long*, ibid. 445.

MARSDEN *versus* PANSHALL.

Case 381.

11 *Novembris.*

Lord Chancellor.

A country clothier sends cloths to his *London* factor to sell. Factor pawns them.—Pawnee by answer admits factor pawned some cloths, but knows not whether they were the plaintiff's.

Ordered, that the clothier in the presence of two or more may have a view of them.

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THE plaintiff was a clothier in *Yorkshire*, and intrusted one *Bumpas* to sell his cloths here in *London*. *Bumpas* after he received the cloths from the plaintiff pawns them to the defendant, who was a pawnbroker in town.—The plaintiff's bill was to discover whether those cloths came to the hands of the defendant; who by answer confessed, that some cloths were pawned to him by *Bumpas*, but did not admit that they were the plaintiff's cloths, whereby to enable him to bring an action at law.

Serjeant *Maynard* this day moved for the plaintiff, that the defendant might be ordered to let the plaintiff, with two or more *persons present have a sight of the cloths pawned by *Bumpas*, which was ordered accordingly; the meaning of which was, and so it was taken by the court, that the plaintiff should thereby be enabled to bring an action at law. (1)

(1) Reg. Lib. 1686. B. fol. 32. Though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and receipt, *Paterson* v. *Tash*, Strange 1178. So if a factor pledge the goods of his principal the latter may recover the value of them in trover against the pawnee on tendering the factor what is due to him, without any tender to the pawnee, *Daubigny* v. *Duval*, 5 Term Rep. 604. [See *Maccombie* v. *Davies*, 7 East, 5. *Graham* v. *Dyster*, 6 M. & S. 4. *Boyson* v. *Coles*, ib. 14. *Queiroz* v. *Trueman*, 3 B. & C. 348. Stat. 6 G. 4. c. 94.]

Case 382. HUNT *versus* MATTHEWS.

20 *Novembris. Master of the Rolls. In Court.*

Eq. Ca. Ab. 59, pl. 5. S. C.

A widow before her marriage with her second husband assigns over the greatest part of her estate to trustees in trust for her children by her former husband. Though this was without the consent of her second husband, yet it being to provide for her children by former husband, it is good. And husband suppressing the deed decreed to pay 800*l.* being the sum proved to be mentioned in the deed to be the value of the goods.

THE case was: a widow before she married the defendant, her second husband, assigned over the greatest part of her estate, to the value of 800*l.* to trustees, as a provision for her children by her first husband. The defendant after his marriage having got this deed into his possession suppressed it.

Upon the hearing it was insisted for the defendant, that this deed made by the widow, a little before her marriage with the defendant, was fraudulent, and done with a design to cheat her husband, and ought not therefore to be countenanced in equity: and cited the case of Sir *Philip Howard* and *Baker*, where an assignment made by the widow before her marrying a second husband was by a decree set aside.

But the Court thought, that a widow might with a good conscience, before she put herself under the power of a second husband, provide for the children she had by the first; and the deed being suppressed by the defendant, by which the particulars and value of the estate might appear, decreed him to pay the 800*l.* without directing any account. (1)

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(1) This decree stands entered 12th November, and interest was decreed from the time of the marriage of defendant with the plaintiff's mother, to be computed by the Master, [it fully appearing that there was a deed made and executed by the said *Sarah Hunt* the widow before her marriage with the defendant, for settling the value of 800*l.* on or in trust for her daughter the plaintiff *Ann Hunt*, but that the defendant confessed that he was consenting thereto, and that after his marriage he got the same deed into his custody, and burnt or destroyed it, so that it should never rise against him, nor ever do the plaintiff *Ann Hunt* any good;] and the defendant was to be allowed for the maintenance of plaintiff for such time as she lived with him and his wife, the plaintiff's mother. And the decree on a re-hearing, was confirmed. Reg. Lib. 1686. A. fol. 152. 303. Vide *King* v. *Cotton*, 2 P. Wms. 357, 674., where, however, the settlement against which relief was sought by the husband, appears to have been made by the wife before any treaty for the second marriage was entered into; et vide *Boxes* v. *Lady Strathmore*, 1 Ves. jun. 22. 2 Bro. Ch. Rep. 345. S. C. *Pitt* v. *Hunt*, ante 18. *Carleton* v. *Earl of Dorset* & *Al'*. post 2 vol. 17. So where a debt is contracted for valuable consideration, though concealed from the husband, it is no fraud on the marriage, *Blanchet* v. *Foster*, 2 Vez. 264.

FURSOR *versus* PENTON.

Case 383.

Eodem die. Master of the Rolls. In Court.

Husband covenants with his intended wife that she should have power to dispose of 300*l.* of her estate. Whether this covenant is discharged by the marriage?

THE case was: a man before marriage covenants with his intended wife, that she should have * power to dispose of 300*l.* of her estate, notwithstanding the intermarriage. The husband now brings his bill against the defendant, in whose hands the 300*l.* was, setting forth that if there was any such agreement with his wife, the same was discharged by the intermarriage.

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For the defendant it was insisted, that he was concerned only as a trustee; but offered it to the court, that though the covenant was improvidently taken in the name of the wife, whereas it ought to have been in the name of trustees, and though it should be admitted that the marriage, in strictness of law, had discharged the covenant, yet a court of equity would never suffer a trust to be so defeated; and the court inclined to dismiss the bill: but then the plaintiff's counsel alleging, that the wife was consenting that the money should be paid to the husband, the court adjourned the cause till next term, when the plaintiff might bring his wife into court to be examined. (1)

In the arguing of this case, the case of *Smith* & *Ux.* v. *Stafford*, in *Hob. fo.* 216. was cited, where according to the book a promise by the husband to the wife before marriage to leave her 500*l.* at his death was discharged by the intermarriage: but note, the case of *Clarke* and *Thompson*, (*Cr. Jac. fol.* 571.) is directly contrary; and there the case of *Smith* and *Stafford* is cited, and *three Judges* were of opinion, that the promise was not discharged by the inter-

(1) Such a covenant seems good in equity, *Harvey* v. *Harvey*, 1 P. Wms. 125. *Gage* v. *Acton*, 1 Salk. 325. 12 Mod. 290. Com. Rep. 67. *Acton* v. *Peirce* & *Al*, post 2 vol. 480, where bond given to the wife by the husband before marriage, though extinguished at law by the marriage yet good in equity. [And see *Wright* v. *Cadogan*, 2 Eden, 239. *Prebble* v. *Boghurst*, 1 Swan. 309.] So a bond from feme sole to her intended husband, *Cannel* v. *Buckle*, 2 P. Wms. 242. Vide, however, the distinction taken between bond and covenant or promise in such case by *Holt*, Chief Justice, *Gage* v. *Acton*, ub. sup. the former being extinguished by the marriage, the latter not. Vide as to settlement, *Durnford* v. *Lane*, 1 Bro. Ch. Rep. 106. *Williams* v. *Williams*, ibid. 152. So marriage with a legatee is no revocation, *Ewbank* v. *Hallowell*, 2 Bro. Ch. Rep. 220.

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marriage; and only my Lord *Hobart* of the contrary opinion: but neither of those cases come up to this case; for here it is that the wife, though married, may dispose of 300*l.* There it is, that the husband at his death would leave his wife worth 500*l.* and the reason of the case in *Cr. Jac.* is, that it was not a duty during the coverture. (1)

(1) And therefore could not be released in deed or in law, *Gage* v. *Acton*, Comyn. Rep. 69.

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COLE *versus* WARDEN.

Case 384.

15 *Novembris. In Court. Lord Chancellor.*

If the equity of redemption of a mortgage for years is assets to pay bond-debts.

See the next case.

THE plaintiff having a subsequent mortgage, and having also bought in the title of the heir at law to one *Le Wright*, brought his bill against the defendant and one *Richardson* and others, and *Richardson* by answer set forth, that he had a prior mortgage from *Le Wright*, and also moneys due to him by bond, and on payment should be ready to re-convey.

For the defendant it was insisted, that as against the heir, the mortgage being but a mortgage for years, the reversion, which attracts the redemption, was assets at law, and for that reason the equity of redemption was adjudged assets in this court in the case of *Davie* and *Dabinett*, which was first heard at the *Rolls*, and settled upon an appeal to the *Lord Chancellor;* but it was admitted there was a difference between a mortgage in fee, and a mortgage for years: for in the case of *Bennett* and *Box*, which was resolved with the advice of Judges, they would not allow, that the equity of redemption of a mortgage in fee should be assets in equity to pay a bond creditor: (1) but in this case the plaintiff has

(1) Vide *Baden* v. *Earl of Pembroke*, post 2 vol. 55. and cases in not. there. *Solley* v. *Gower*, ibid. 61. *Deg* v. *Deg*, 2 P. Wms. 416. and cases in not. there. *Lord Masham* v. *Hardinge*, in the Exchequer. Trin. 8 Geo. II. 34 Lib. N. 55. 67. Bun. 339. *Ryall* v. *Ryall*, 1 Atk. 59. Reversion in fee being in the mortgagor, on a mortgage for years it is legal assets, *Plunket* v. *Penson*, 2 Atk. 293. Otherwise where it is a mortgage of the whole inheritance, ibid. Otherwise also where mortgagor himself has but a term of years, Case of Sir *Charles Cox's* Creditors, 3 P. Wms. 341. *Hartwell* v. *Chitters*, Amb. 308. But these last two cases said *arguendo* at the bar, to have been considered as over-ruled, *Sharpe* v. *Earl of Scarborough*, 4 Ves. 541. [But see *Clay*

not only the title of the heir at law, but also subsequent mortgages, which his counsel alleged were to the value of the estate.

The *Lord Chancellor* directed the Master should certify that matter specially, and when he saw the value of the estate, he would decree according as the nature of the case required; his present opinion being, that if there was a surplus beyond the mortgages, it should be assets to answer bond-debts. (1)

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v. *Willis*, 1 B. & C. 372. where they are cited by Bayley, J.] Nor will the cases that consider an equity of redemption as equitable assets apply to judgment creditors, who are to be paid in the first instance. [*Sharpe* v. *Earl of Scarborough*, ub. sup.] Et vide as to reversions after estate tail, which though not strictly speaking assets at law, yet have a quality that renders them liable *in futuro*. *Kinaston* v. *Clarke*, 2 Atk. 206. And note a charge for payment of debts will make equitable assets, *Bailey* v. *Ekins*, 7 Ves. 319. *Shiphard* v. *Lutwidge*, 8 Ves. 26. [*Clay* v. *Willis*, ub. sup.] How far an advowson in gross is assets, *Ripley* v. *Waterworth*, 7 Ves. 447. And for the distinction between a power and absolute property, in respect of their being assets, and that a power not executed is not assets for debts, *Holmes* v. *Coghill*, 7 Ves. 505-6.

(1) Reg. Lib. 1686. A. fol. 99. by the name of *Cole* v. *Richardson*, and the decree was, that defendant *Richardson* should be first paid his principal, interest, and costs at law, and in this court, and then as to all the said mortgage-debts, and the bond-debts of defendant *Richardson*, the Master was to certify as above. There are several entries in the Register's Book in the cause, *Cole* v. *Richardson*, but no decree on the point above-mentioned appears.

PLUCKNET & Al' *versus* KIRK.

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Case 385.

Eodem die. In Court.

If the equity of redemption of a mortgage in fee shall be assets in equity to satisfy bond-debts.

See the next preceding case.

AMONGST other matters in this case, the point chiefly disputed was, whether the equity of redemption of a mortgage in fee, since the statute of *Frauds* and *Perjuries*, should be assets in equity to satisfy a debt by bond; and the *Lord Chancellor* inclined that it was, but respited his decree till the Master had reported a state of the case. (1)

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(1) The decree was reserved both as to judgment and bond-debts. Reg. Lib. 1686. B. fol. 181. And so afterwards decreed. R. L. ibid. fol. 844. Vide *Cole* v. *Warden*, ante 410, and cases in not. there.

Case 386. CLOWDSLEY *versus* PELHAM.

19 *Novembris.* *Lord Chancellor.*

Eq. Ca. Ab. 197, pl. 2. S. C.

One devises all his lands to *A.* and the heirs of his body, remainder over, and in another part of the will devises to *A.* all his personal estate, and makes him executor, willing him to pay his debts. This is a charge upon the lands as well as on the personal estate to pay the debts.

THE plaintiff's bill was to have satisfaction for a debt owing to him by *Anthony Deane* deceased, who by his will had devised all his lands to the defendant *Pelham* and the heirs of his body, with remainder over to another; and in another part of his will, reciting that he owed the defendant *Pelham* money upon account, he therefore devised to him all his personal estate, and made him executor, willing him to pay his debts. (1)

Upon the reading of the will, though the clause as to payment of debts seemed to relate to the personal estate only, and though the lands were devised to the defendant in tail with a remainder over to another, and that it was objected that a tenant in tail could not be a trustee, yet the court decreed both real and personal estate to be sold for payment of the testator's debts. (2)

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(1) Vide *Newman* v. *Johnson*, ante p. 45. *Lypet* v. *Carter*, 1 Vez. 499. Real estate decreed to be charged with annuity given by the will, though no express words to charge the land, the executor being devisee of the land, *Elliott* v. *Hancock*, post 2 vol. 143. So as to legacies, *Alcock* v. *Sparhawk*, post 2 vol. 228, where said this case of *Clowdsley* v. *Pelham*, affirmed on appeal to the Lords.

(2) Reg. Lib. 1686. A. fol. 88. Vide *Haslewood* v. *Pope*, 3 P. Wms. 322, and cases in not. there. *Gray* v. *Minethorpe*, 3 Ves. 103. *Burton* v. *Knowlton*, ibid. 107. *Brummell* v. *Protheroe*, ibid. 111. *Williams* v. *Chitty*, ibid. 550. *Hartley* v. *Hurle*, 5 Ves. 546. And the rule at present seems to be, that the personal estate is the natural fund; that against the charges naturally thrown upon the personal estate, you may shew a distinct exemption, or from the whole will you may collect that there is an intention expressed in the will (not in *totidem verbis*) that the personal estate shall be exempt, but that charging the real estate ever so anxiously for payment of debts, will not, *of itself*, be sufficient to exempt the personal estate, *Tait* v. *Lord Northwick*, 4 Ves. 823-4. *Brydges* v. *Phillips*, 6 Ves. 567. And the declaration or intention to exempt the personal estate must be plain and manifest, *Howe* v. *Lord Dartmouth*, 7 Ves. 149. *Powell* v. *Robins*, ibid. 209. So *Milnes* v. *Slater*, 8 Ves. 305. [*Bootle* v. *Blundell*, 1 Mer. 193. *Gittins* v. *Steele*, 1 Swan. 24. *Greene* v. *Greene*, 4 Madd. 148.]

DURSTON *versus* SANDYS.

Case 387.

24 *Novembris.* *Lord Chancellor.*

Eq. Ca. Ab. 86, pl. 2. 2 Ch. Ca. 186. 2 Ch. Rep. 398. S.C.

THE defendant upon his presenting the plaintiff to a parsonage took a bond of him to resign, which though in itself lawful, (1) yet the patron making an ill use of it, *viz.* to prevent the incumbent from demanding tythes in kind,* the court awarded a perpetual injunction against the bond. (2)

A perpetual injunction awarded against a bond of resignation, the patron making an ill use of it.

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(1) [Now settled *contra*, in case of a general bond, *Bp. of London* v. *Ffytche*, 1 East, 487. After the decision of that case it was considered that a bond to resign in favour of a specified person was legal. *Newman* v. *Newman*, 4 M. & S. 71. But in *Fletcher* v. *Sondes*, 9 April, 1827, the House of Lords held a bond to resign in favour of any brother of the obligee to be illegal.]

(2) The defendant had a large estate in the parish, and upon the plaintiff's demanding tithe of the defendant, for the same, the defendant gave him notice to resign, the plaintiff accordingly attempted to resign to the *Bishop of Gloucester*, who, on learning the cause of the resignation, refused to receive it, and ordered the plaintiff to continue to do duty in the parish in question. The defendant then put the bond in suit, and the plaintiff filed his bill. The defendaut put in a plea, which was over-ruled. Reg. Lib. 1686. A. fol. 80. The cause was then heard 24th Dec. according to the Register's Book, and decree as above stated. Reg. Lib. 1686. A. fol. 108.

DRURY *versus* HOOKE.

Case 388.

Eodem die. *In Court.* *Lord Chancellor.*

Eq. Ca. Ab. 89, pl. 2. 2 Ch. Ca. 176, S.C.

THE bill was to be relieved against a marriage *brocage* bond: and it appearing that the marriage was brought about without the consent of the young woman's parents, who were then living, the *Lord Chancellor* for that reason alone decreed the bond to be delivered up, (1) terming it a sort of kidnapping; and said, there was a material difference, where the parties were at their own dispose, and where their parents were living: though such a bond was in no case to be countenanced. (2)

Marriage brocage bond decreed to be delivered up, the marriage being had without the consent of the woman's parents. Such bonds not to be countenanced.

(1) And a perpetual injunction. R. L.

(2) It appeared upon the pleadings in this case, that the defendant agreed

to abate 40*l.* in every 1,000*l.* the portion of the intended wife should fall short of the sum named, as her portion by defendant, namely 4,000*l.*, the bond from the plaintiff being to secure 160*l.* Reg. Lib. 1686. A. fol. 69. Vide *Anon.* Pre. Ch. 267. For the principle on which this court decrees against marriage brocage bonds, and bonds in fraud of marriage agreement, vide *Hall* v. *Potter* & *Al'*, 3 Lev. 411. *Debenham* v. *Ox*, 1 Vez. 277. Vide also *Cole* v. *Gibson*, ibid. 503, and cases cited in not. there. *Redman* v. *Redman*, ante 348. *Gale* v. *Lindo*, post 475.

Case 389.

CANNING *versus* HICKS.

26 Novembris. Lord Chancellor.

2 Ch. Ca. 187, S. C.

A forfeited mortgage in fee decreed to be personal estate, and to belong to the executor, and not to the heir.

Upon a re-hearing of this cause the sole point insisted on was, where a man had by his will devised particular legacies to his executors, as he had likewise done to his heir, whether the heir or executor, there being no defect of assets, should have some mortgages in fee made to the testator, that had been forfeited in his life-time; and the court confirmed their former decree in favour of the executor; but did admit, as this case was circumstanced, there was much to be said in behalf of the heir: but since it had been often very solemnly settled, that all mortgages should be looked on as part of the personal estate, and that it was now grown the established rule of the court, it was not fit to alter it, in order to accommodate one particular case.

In the argument of this case was cited the case of *Turner* and *Crane*, on the one side, where an old forfeited mortgage of a copyhold was decreed to the heir: and on the other hand the case of *Baker* and *Thornbury*, settled in the Lord *Nottingham's* time, where in the case of an old forfeited mortgage in fee, though the money by the proviso was made payable to the heir, yet it was decreed to be part of the personal estate: and the case of *Noy* and *Ellis*, though the mortgagors would not redeem, yet the land was decreed to the executors, against the heir. (1)

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1 Ch. Rep. 283.

2 Ch. Rep. 220.

(1) Reg. Lib. 1686. A. fol. 1106. And it is now a rule in all cases, that the mortgage money shall be decreed part of the personal estate, and belong to the executor or administrator, unless an intention be declared by the mortgagee, or it appears evidently from his conduct that it should not be so considered, as if he foreclose or obtain a release of the equity of redemption, and get actual possession of the premises, vide *Wynn* v. *Littleton*, ante 4, and cases cited in not. there. Powell's Law of Mortgages, 2 vol. 682, et seq.

COKE *versus* FOUNTAIN.

Case 390.

Eodem die.

In Court.

Master of the Rolls.

Eq. Ca. Ab. 227, pl. 3. S. C.

Depositions taken in a former cause cannot be read in another cause against one who does not claim under the party against whom those depositions were taken.

Upon a motion the defendant *Fountain's* counsel moved, that they might be at liberty to read depositions in this cause, which were taken in a cause where the plaintiff's father was a party; the suit being in all matters the same: but on the other side it was objected, that the now plaintiff not claiming as heir, and his father being only tenant for life, those depositions could not be read against him: and after long debate the defendant had only the common order for leave to read those depositions at the hearing, saving just exceptions. (1)

But if a legatee brings a bill against the executor, and proves assets, another legatee, though no party, may have the benefit of those depositions.

It was said by Mr. *Serjeant Phillips*, that it is a common case, where one legatee has brought his bill against an executor, and proved assets, and afterwards another legatee brings his bill, that he should have the benefit of the depositions in the former suit, though he was not party to it. (2)

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(1) This was upon cause shewn by defendant's counsel, against an order *nisi* obtained on a former day on a motion by the plaintiff. Reg. Lib. 1686. A. fol. 169.

(2) So where the question is the same, and the defence the same, in two distinct causes between the same parties, depositions taken in one cause may be read in the other, *Nevill* v. *Johnson*, post 2 vol. 447. But where original and cross-cause, *Lord Hardwicke* refused to suffer the evidence in the cross-cause to be read, touching the matters in issue in the original cause, otherwise as to depositions not relating to matters in the original cause, *Welford* v. *Beaseley*, 3 Atk. 501. But depositions in the cross-cause allowed to be read on account directed in the original cause, and *that* though cross-bill dismissed, *Lubiere* v. *Genou*, 2 Vez. 579. Et vide Wyatt Prac. Reg. 173. 175. [See also *Goodenough* v. *Alway*, 2 S. & S. 481.]

Case 391. **TRAITON *versus* TRAITON.**

27 Novembris.

Lord Chancellor.

Eq. Ca. Ab. 88, (D) pl. 2. S. C.

One differing with his mother settles his mansion-house on his brother, but first takes a bond from him in his sister's name that the brother should not permit his mother to come into the house.

THE heir having had some difference with his mother the jointress, relating to the repairs of the mansion-house, (1) he settles the estate upon his brother, but first takes a penal bond from him of 500*l.* penalty in the name of the defendant his sister, that he should never suffer his mother to come into the house. The bill was to be relieved against this bond.

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Bond set aside in equity as an unnatural bond.

The Court (though the defendant insisted on the breach of the bond, and that thereby a provision was intended her) decreed the bond to be delivered up and cancelled; it being against the law of nature to prohibit a son to cherish his mother. (2)

(1) It appears from the pleadings that the mother lived in the house several years, paying no rent and suffering it to run to decay, and that the heir fearing his mother would so continue to do after his death, and to make some provision for his sister, (who had no portion) in case of such an event, took the bond from his brother as above stated. R. L.

(2) The bond being in court was delivered in, and cancelled by the Register in open court, and afterwards delivered to the plaintiff. Reg. Lib. 1686. B. fol. 100.

Case 392. **WALL & Ux. *versus* THURBANE.**

6 Decembris.

Lord Chancellor.

Ante Case 352.

SIR *George Crooke* by his will devised that his real estate should descend to his three daughters and heirs, provided that his wife should distribute it in such proportions as she should think fit. (1) The mother by deed executed in

(1) The words of the devise of the premises in question, as stated in the Register's Book, are "To dame *Susan* "his wife for life, and after her de- "cease he willed and devised that the "same should descend and come to "his said three daughters, their heirs "and assigns for ever, nevertheless in "and by such part and parts, share "and shares, proportion and propor-

her life-time appoints a very small proportion for the plaintiff's wife, who was one of the three daughters, and had appointed the rest for the other two daughters; and the bill was to be relieved against this unequal distribution. (1)

Upon long debate the Court declared the case was proper and relievable in equity; for as the mother here had appointed this daughter a less proportion than the other, so she might for some (it may be) causeless displeasure have allotted her but one barren acre only; and it would be hard if equity in such a case should not interpose: and if the court might interpose in that case, it cannot then be objected, that the court ought not to intermeddle, or wants jurisdiction in the case in question; and it is discretionary in the court, whether it shall relieve in this case or not; and the court took time to consider of it, and to be attended with precedents. (2)

In the argument of this case were cited the cases of *Cracer* and *Perrot*, and * *Gibson* and *Kinven*, where a man by will left his personal estate to his wife, to be distributed amongst his children at her discretion, and she gave all to one child, and none to another, and the court controuled that disposition; such clauses being generaly intended to preserve obedience only.

*Ante Case 63.

But *note*, one main reason in the case last cited was, that the wife had married a second husband, and being under coverture her distribution might be influenced by her husband's authority. (3)

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" tions, as his said wife by any writing " under her hand and seal in the pre- " sence of three or more credible wit- " nesses, or by her last will in writ- " ing, should limit, direct, and ap- " point."

(1) The mother appointed lands of the annual value of 10*l.* and wood thereon to the value of 3,000*l.* to one of the defendants, and other lands of the annual value of 14*l.* and timber thereon to the value of 3,000*l.* to another of the defendants, both the plaintiff's sisters, and to the plaintiff lands of the annual value of 5*l.* with little or no wood thereon. R. L.

(2) Reg. Lib. 1686. B. fol. 79, 142. The bill appears afterwards to have been dismissed on compromise, ibid. fol. 648.

(3) *Note.* In the principal case Sir *George Crooke* appears to have been the mother's second husband, and Mrs. *Wall*, the wife of the plaintiff to have been the daughter of the first marriage, and Mrs. *Thurbane* and *Isabella Crooke*, the daughters of the second marriage. Vide *Maddison* v. *Andrew*, 1 Vez. 57. *Gibson* v. *Kinven*, ante 66, and cases cited in note p. 67.

Case 393.

NEVIL *versus* SAUNDERS.

Eodem die.
Lord Chancellor.

Eq Ca Ab. 382, pl. 1. S. C.

Lands limited to *A.* in trust for a feme covert, and that *A.* should receive the rents and apply them as the feme, whether sole or covert, should direct.

This is a trust, and not an use executed by the statute.

LANDS were given by will to trustees and their heirs, in trust for *Anne* the defendant's wife and her heirs, (1) and that the trustees should from time to time pay and dispose of the rents and profits to the said *Anne*, or to such person or persons as she by any writing under her hand, as well during coverture as being sole, should order or appoint the same, without the intermeddling of her husband, whom he willed should have no benefit or disposal thereof; and as to the inheritance of the premises in trust for such person or persons, and for such estate and estates, as the said *Anne* by any writing purporting her will, or other writing under her hand, (2) should appoint; and for want of such appointment, in trust for her and her heirs. (3)

The question was, whether this was an use executed by the statute, (4) or a bare trust for the wife: and the Court held it to be a trust only, and not an use executed by the statute. (5)

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(1) "And assigns." R. L.

(2) "And seal in the presence of "two or more credible witnesses, as "well during coverture, as being sole, "should give, limit, and appoint."

(3) "And assigns." With these alterations, the above contains the words of the devise, as stated in the Register's Book.

(4) 27th Hen. VIII. cap. 10.

(5) Reg. Lib. 1686. B. fol. 160, in which latter case the remedy would have been at law, *Popham* v. *Bampfield*, ante 80. *Sed quære*, if an account sought, ibid. Had the devise been that *Anne* should take the profits, that would, it seems, have been a use executed according to 36 Hen. VIII. Bro. Feoff. al uses. B. N. C. 282. But the devise being to trustees, in trust to pay and dispose of the rents and profits to the said *Anne*, would not be executed by the statute, because the legal estate must remain in the feoffees, in order to enable them to pay over the profits. This construction has ever since prevailed, and therefore it is now clear that if there be a conveyance in trust to pay over the profits, or to convey, to sell, &c. the legal estate, *must*, in these cases respectively vest in the trustees. Vide Bac. Uses 8. *Symson* v. *Turner*, 1 Eq. Ca. Ab. 382, pl. 1, in not. *Silvester* v. *Wilson*, 2 Term Rep. 444, 451. *Bagshaw* v. *Spencer*, 2 Atk. 578. Note in the case of *Silvester* v. *Wilson*, ub. sup., the court, in its judgment appears to have laid some stress on the words "and to be "applied for the subsistence and main-"tenance of *cestui que* trust," but not, it is presumed, so as to interfere with the general doctrine. And where the trust was to permit *A.* to receive, or to pay, apply, and dispose of the rents, &c. as *A.* should appoint, it is now construed a trust, and for that purpose, though a good use at law, yet considered in this court as executed in the trustees. Sic dict. arg. *Pybus* v. *Smith*, 3 Bro. Ch. Rep. 340. Vide also *Griffiths* v. *Smith*, Moor 753.

Bush v. *Allen*, 5 Mod. 63. *Harton* v. *Harton*, 7 Term Rep. 652. At law, before the statute of Uses, every use was a trust, then the statute executed the legal estate, and joined it to the use, and therefore a trust executed is now a legal estate, and to bring it to a trust in equity, the legal estate must want to be executed by a conveyance, *Bagshaw* v. *Spencer*, 2 Atk. 583.

HOWE & Al' *versus* HOWE & Al'.

Case 394.
7 December.
Lord Chancellor.

A copyhold estate granted for the lives of *A. B.* and *C.* *A.* dies intestate. His administratrix shall have the estate during the lives of *B.* and *C.*

J. S. who had taken a copyhold estate for the lives of himself and his two brothers, dies, leaving a son: the uncles during the life of their nephew suffer him quietly to enjoy; but now he being dead, they disturbed the administratrix of their nephew; and the bill was brought by her to be relieved, as having the title of the first taker, who paid the fine; the other two lives being but in the nature of trustees for him.

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Upon long debate the court decreed for the plaintiff the administratrix, against the uncle; though it was taken notice of and pressed in arguing for the defendant, that there was not any custom in the manor, of which the estate was held, that the first taker might surrender; nor is there any such custom where the copies run *successivè*. (1)

In arguing of this case were cited as precedents of like decrees, the cases of *Powell* and *Theallwell*, * *Clarke* and *Danvers*, *Thynne* and *Bampfield*.

*1 Ch. Ca. 310.

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(1) So *Withers* v. *Withers*, Amb. 151, determined on the authority of this case; and per *Lord Hardwicke*, resulting trusts of copyhold as well as freeholds, are within the statute of Frauds and Perjuries. Note, in the case of *Withers* v. *Withers*, it appears to have been the custom of the manor, to grant copyholds for three live *successivè*. Sed vide *Rundle* v. *Rundle*, post 2 vol. 252, 264. Eq. Ca. Ab. 119, pl. 9, S. C., where distinction taken between the cases where such custom prevails, and where it does not. And where the fine appears by the copy to be paid by one of the lives only, the other lives will be decreed in equity trustees, unless clear evidence appear to the contrary, *Benger* v. *Drew*, 1 P. Wms. 780. *Smith* v. *Baker*, 1 Atk. 385. But there is a case in the Exchequer of *Dyer* v. *Dyer*, Mich. Term. 1788, [2 Cox, 92.] cited in Mr. Cox's note to *Lamplugh* v. *Lamplugh*, 1 P. Wms. 112, where there was a custom for the copies to run *successivè*, in which a contrary decision to that in the principal case was made. [But there the life was a son of the person who paid the fine, in which case the presumption is that he was not intended to be a trustee, *Murless* v. *Franklin*, 1 Swan. 13. *Prankerd* v. *Prankerd*, 1 S. & S. 1. *Rider* v. *Kidder*, 10 Ves. 360.]

Case 395.
8 *Decembris.*
Lord Chancellor.

POWELL *versus* ARDERNE and CHEVALL.

Eq. Ca. Ab. 39, pl. 2. S. C.

If a defendant demurs, because the bill contains several distinct matters against several defendants, he must by answer deny combination, if it is charged by the bill.

DEFENDANT demurred, because the plaintiff's bill was brought against several defendants for several distinct matters. The demurrer was over-ruled, because the plaintiff by his bill had charged the defendants with combination, which the defendant had not denied by answer. (1)

(1) In the Register's Minute-book, 8th Dec. 1686, two demurrers over-ruled. *Lloyd* v. *Rattray and another*, 19th Nov. 1788, in the Exchequer, not reported, *Lord Chief Baron* thought this case right. Note, by Mr. *Selwyn*. "A single case, I believe, on this "point, and contrary to the practice "of settling demurrers, W. S." But the answer must not go further than merely to deny combination, otherwise it will over-rule the demurrer, *Hester* v. *Weston*, post 463. Et vide *Simmonds* v. *Lord Kinnaird*, 4 Ves. 747. But though the defendants have separate and distinct rights, yet if one general right is claimed by the bill, the demurrer will not hold, *Mayor of York* v. *Pilkington* & *Others*, 1 Atk. 282. It is, however, clear that where two demands though of a similar nature, are yet distinct, and unconnected, demurrer to a bill in which such demands are included, will hold, *Ward* & *Al.* v. *Duke of Northumberland*, 2 Anstr. 469. Mit. Tr. Eq. 147.

Case 396.
11 *Decembris.*
Lord Chancellor.

BARBON *versus* SEARLE.

After a decree of dismission affirmed on an appeal to the *Lords*, bill is brought for discovery of a deed, said to be burnt pending the appeal, which made out plaintiff's title, that after such discovery plaintiff might apply to the *Lords* for relief. Defendant, upon a demurrer, ordered to answer, but plaintiff to proceed no further without leave of the court.

THE plaintiff by his bill, which was partly original and partly a bill of review, set forth the order made by the *Peers* in *Parliament*, whereby *Clerke*, the plaintiff in the original cause, whose interest the now plaintiff hath, was relieved as to a moiety of the personal estate, and dismissed as to the real; and that such order had not been made, but that the defendant suppressed the evidences, and had pending the appeal (as the plaintiff hath since discovered) burnt the deed that made out the plaintiff's title; and therefore prayed the defendant might answer and discover the matters aforesaid, the plaintiff alleging in his bill that he did not thereby design to impeach the order of the House of *Lords*, but that by this discovery he might be capacitated to apply*to the *Lords* in *Parliament*, when there should be a sessions, for such relief as the nature of the whole case, when discovered, should require.

To this bill the defendant demurred; (1) and in arguing the demurrer Serjeant *Maynard* for the defendant insisted, that after a judgment given upon an appeal in the House of *Lords* this court could not intermeddle further, than to settle so much of the cause as the *Lords* had transmitted to this court, which concerned only the personal estate; and that matter this court had already, pursuant to the direction of the House of *Lords*, determined; and that no bill of review would lie in this case. That bills of review are not favoured, and are tied up to strict rules; and for that purpose cited the case of *Dunny* and *Filmore*, where upon a bill of review the court had decreed the whole estate to the plaintiff; and though it appeared even upon the face of the decree, that the plaintiff had a title but to one moiety only, yet it was there resolved, that no bill of review would lie upon a bill of review; (2) and the defendant was left without remedy. And he likewise cited *Morgan's* case, where upon a bill of review the plaintiff could not produce the deed, and so failed at the hearing of making out his equity; and though the deed came afterwards to his hands, which plainly made out his title, yet it was adjudged to be a right without a remedy, and the defendant to be without relief: and he likewise observed, that the plaintiff's title of his own shewing was only as assignee of *Clerke*; and an assignee can in no case have a bill of review, much less an assignee that comes in, as the plaintiff did, *pendente lite*. (3)

Ante Case 124. 2 Ch. Rep. 133.

For the plaintiff it was answered, that the stress of the Serjeant's argument was levelled, as supposing this to be a bill of review; whereas it was as well an original bill, as a bill of review; and that a difference had been commonly taken and allowed in this court (though it was not necessary to maintain the bill in question) between a decree and a dismission, (to wit) where there is a decree, *that* is not to be altered but by bill of review; but where there was only a

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(1) He also pleaded the dismission of the former bill, at the suit of Sir *Robert Clerke*, under whose title the present plaintiff claimed, and the affirmation of that dismission by the House of Peers, upon the dismission of the petition of appeal from that dismission: and the demurrer was for that there was no error in law in the said dismission in this court. R. L.

(2) Sed vide 2 Chan. Pract. 633. Mitford's Tr. p. 69. 3d Edit.

(3) So a purchaser or assignee, who comes not in in privity, is not entitled to bring a *scire facias* to revive a decree, vide *Dunne* v. *Allen*, post 446, and said there that such purchaser or assignee should bring an original bill to have a parallel decree made. *Sed quære* And particularly after decree enrolled vide *Dunne* v. *Allen*, ante 283.

BARDON v. SEARLE.

dismission, an original bill might be brought upon a new equity: (1) and said, they did not pretend to say, that this court could reverse or alter the order of the House of *Lords:* but as there is little doubt to be made but that the Parliament if it had been sitting, upon a petition would have directed this matter to have been examined in this court, in regard that it is not the course there to take answers upon oath; so in the interval of Parliament, when we cannot obtain such direction, this court may well proceed to have a discovery of this matter; or else by death or otherwise the plaintiff peradventure may lose the benefit of it; so that this bill is not to change or alter the *Lords'* order, but in effect auxiliary to the proceedings before them.

The Court hereupon ordered the defendant to answer the bill; and when he had so done, the plaintiff was not to proceed any further without the special leave of the court. (2)

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(1) Quære, vide *Prettyman* v. *Prettyman*, ante p. 310, and cases there referred to. But an order dismissing a bill for want of prosecution is not a bar to another bill, *Brandlyn* v. *Ord*, 1 Atk. 571.

(2) The decree is as follows: "Whereupon, &c. his Lordship declared that inasmuch as the Lords "were not now sitting, whereby to "have a direction touching the said "matter, in respect of the suppression "of the said deed, and if they were, "yet in regard answers put in to petitions there, were not used to be so "put in on oath, and inasmuch as the "House of Peers had referred it back "to this court, to re-hear the said "cause, as to one of the said parties, "which being done, and the said Sir "*Robert Clerke* being relieved as to "that part, he conceived there ought "to be a discovery, and that the defendant ought to answer the said bill, "so as to put the plaintiff in a condition of relief as to the *other parts* "from the Lords, upon any application "to them when they shall sit, in case "their Lordships shall think fit, and "doth therefore order that the said defendant do answer the said plaintiff's "bill, but that no further proceedings "be thereupon had without the further "order of the court." Reg. Lib. 1686. A. fol. 1125.

Case 397.

Eodem die.

Lord Chancellor.

ORDE *versus* HEMING.

Eq. Ca. Ab. 314, pl. 2. S. C.

THE bill was to redeem a mortgage; and the defendant demurred, by reason that of the plaintiff's own shewing it appeared, the mortgage was 60 years old.

If a mortgagor agrees the mortgagee shall enter, and hold till he is satisfied; length of time is no objection to a redemption.

The demurrer upon argument was over-ruled, because it was charged in the bill, that the mortgagor agreed the mortgagee should enter and hold, till he was satisfied; which is

in the nature of a *Welch* mortgage; and in such case the length of time is no objection. (1)

ORDE v. HEMING.

(1) Reg. Lib. 1686. B. fol. 165, there is an entry of a plea, which was ordered to stand for an answer, but no further mention appears. Vide plea allowed to such a bill, *Aggas* v. *Pickerell*, 3 Atk. 225. Vide also *Pearson* v. *Pulley*, 1 Ch. Ca. 102. where *Lord Chancellor* directed, that where a bill comes to redeem an old mortgage, defendant should plead or demur that the judgment of the court might be had upon it; *Talbot* v. *Braddil*, ante 394, and cases cited in note there. *Newcomb* v. *Bonham*, ante 7. And in *Smart* v. *Hunt*, at the Rolls, 14th Feb. 1788, not reported, where upon a bill to redeem, it appeared the mortgagee, and those claiming under him, had been in quiet possession of the mortgaged premises for the space of thirty-five years and upwards, and the decree was for redemption in the usual way; and that in taking the account, if the Master should find that the mortgagee, or those claiming under him, had been in possession of the premises as owner or owners thereof, he was to set a rent thereon, and take the account accordingly. Reg. Lib. 1787. B. fol. 686. Note, in the above case of *Smart* v. *Hunt*, the defendants answered, claiming the benefit of length of possession, as if they had pleaded the same. [See as to the bar to redemption from length of time in case of a *Welch* Mortgage, *Fenwick* v. *Reed*, 1 Mer. 125.]

The EARL of KILDARE *versus* SIR MORRICE EUSTACE and FITZGERALD.

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Case 398.

3 *Decembris.*

Lord Chancellor.

Lord Chief Justice Beddingfield.

Lord Chief Baron Atkins.

Ante Case 377. *Post Case* 399. 404. 411. 2 Ch. Ca. 188. S. C.

THE *Lord Chancellor* and the Judges having been attended with precedents, Sir *John Holt* argued for the plaintiff, as to the preliminary point only, (to wit) whether this court had jurisdiction, and might hold plea of the lands in question which lay in *Ireland*. 1*st*. That a trust was purely personal; and that a court of equity here might as well hold plea of a trust, that concerned lands in *Ireland*, as the other courts of law might of other personal contracts, though the same might concern lands in *Ireland*: as if a man being here in *England* enters into bond for granting a rent-charge out of lands in *Ireland*, there is no question but it may be sued in any of the courts of law here: so a covenant entered into in *Ireland*, or a contract made there, may be sued here; and so *è converso*. And it has been held, (it is my Lord *Hobart's* opinion) that an action of the case will lie for a breach of trust. (1) 2*ndly*. That *Ireland* hath its

(1) Vide autem Lord Keeper *North's* opinion, cited to the contrary, ante 344.

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courts of its own by grant from the King; but not exclusive of the King's courts here, for *Ireland* is a conquered kingdom; and a decree of this court may as well bind land in *Ireland*, as by every day's practice it doth lands that lie in foreign plantations: (1) and for precedents cited the case of a *scire fac.* (20 *H.* 6. *fol.* 8.) brought in the *Chancery* here to repeal a patent of lands in *Ireland*. If a man that is beneficed here is made a *Bishop* in *Ireland*, *that* comes within the statute of *H.* 8. against *pluralities*, and shall make void his living here in *England*; and it was resolved in *Evans* and *Ascough's* case, *Latch. fol.* 234. and *Dowdale's* case, in *Co.* 6th *Report* that lands in *Ireland* shall be assets to satisfy a bond-debt here, but otherwise of lands in *Scotland*. And the necessity of the case is considerable; for should not this court relieve in such a case as this, where the land lies in *Ireland*, and the trustee lives in *England*, the *cestui que trust* would be without remedy; for though it is true, we may serve him with a *subpœna* out of this court, returnable in the *Chancery* in *Ireland*, yet if he will not appear upon that *subpœna* we can proceed no further; we cannot take out any *attachment* upon it. (2) And for precedents in this court of decrees made concerning lands in *Ireland* were cited the cases of *Leake* and Lord *Ranelagh*, 8 *Car.* 1. in the Lord Keeper *Coventry's* time, *Archer* and *Preston* soon after the *King's restoration*, and the case of the Lord *Thomond* and *Spencer*.

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The defendant's counsel in a manner waived the preliminary point, and would not enter into the debate, whether this court might not decree the trust of lands in *Ireland*, the trustee living here; but that it was certainly a matter discretionary in the court, whether they would do it or not: and that as this case was circumstanced, they apprehended the court would not interpose. 1*st*. That in this case there had been no less than two judgments in the courts of law in *Ireland*, and no less than *three* bills in equity. 2*ndly*. That Sir *Morrice Eustace* the trustee did not live in *England*, but came here occasionally upon other business; and that it would be unreasonable to keep him from his own country, and from all his other concerns, to attend this suit. 3*dly*. That the case arises upon facts properly triable in *Ireland*, to wit, whether *Fitzgerald*, for whom this trust was created,

(1) Vide *Earl of Arglasse* v. *Muschamp*, ante, 75. (2) Ante 406. S. C.

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was the same *Fitzgerald* that was in the rebellion; and this fact had been twice tried in *Ireland*, and found against the plaintiff. *4thly*. That this case depends upon construction of the act of Settlemant in *Ireland;* for if not only the trust, but the land itself, was actually vested in the King by that act, then it was a pure title at law, and no ground for a suit in equity: and that the lands were so actually vested, was the opinion of the *Chancellor* and *Judges* in *Ireland*, who were the proper expositors of that law. And it was further insisted, that trusts which concern lands are not purely personal; but in some sort local; as particularly in the remedy by injunction for the possession: and that now sequestrations are become a common process, though at first introduced in the Lord *Bacon's* time, and then but sparingly used in process, and after a decree to sequester the thing in demand only. (1) And now likewise bills are common here for a partition, which seem to concern nothing but the land itself; but that was grounded upon the statute, which makes one tenant in common accountable to the other; (2) so that now since the statute, they are become, as it were, trustees, the one for the other. Nor is the plaintiff remediless, his trustees living in *England*, if that were so, for a decree made in *Ireland* may be carried into an execution by *English* bill in this court against his trustee here. And for precedents where this court refused to hold plea of lands in *Ireland*, they cited Sir *William Pettit's* case, (3) where the bill being to have a partition of lands in *Ireland*, was dis-

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Sequestrations first introduced in Lord *Bacon's* time.

Bill for a partition of lands in *Ireland* dismissed but an account of profits decreed.

(1) 3 Bl. Comm. 444. *Ex parte Jephson*, Pre. Ch. 549. where the main point resolved is, "That no sequestration can regularly issue to sequester the estate of any person who cannot be found but upon the return of *non est inventus* by the Serjeant at Arms." Eq.Ca. Ab. 130, pl. 3, in not. Vide general order, Jan. 23. 1794. 4 Bro. Ch. Ca. 544. As to the construction of that order, in case of a Peer defendant vide *Gregor* v. *Lord Arundel*, 8 Ves. 87. As to the effect of sequestration on mesne process and choses in action, *Simmonds* v. *Lord Kinnaird*, 4 Ves. 735. arg. As to the effect of sequestration executed and not executed with respect to judgment at law, *Angel* v. *Smith*, 9 Ves. 337. and a plaintiff having a sequestration and goods or real estate seized thereon, for want of an answer, is not obliged to stop there, but may go on to take the bill *pro confesso*, sic dict. per *Hardwicke*, Lord Chancellor, *Davis* v. *Davis*, 2 Atk. 23.

(2) [Stat. Westm. 2. cap. 22. 31 H. 8. c. 1. and 32 H. 8. c. 32. The statute 8 & 9 W. 3. c. 31. made perpetual by 3 & 4 Ann. c. 18. has since been passed to facilitate the remedy by partition at law; but this species of relief is still generally sought in equity.]

(3) *Hide* v. *Pettit*, 1 Ch. Ca. 91. *Cartwright* v. *Pettur*, 2 Ch. Ca. 214.

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missed *(but note in that case as to the matter of account it was retained)* and in the case of the *Countess of Lanchaile* against *O'Bryan*, 24 *Car' Secundi*, upon articles of marriage, all the transactions having been in *Ireland*, the bill was dismissed.

The plaintiff's counsel having before spoke only to the preliminary point touching the jurisdiction of the court in case of a trust of land in *Ireland*, which was now waived by the defendant's counsel, and the court satisfied as to that matter; and the *Lord Chancellor* inclining to dismiss the bill, because the case turned upon construction of the act of Settlement, and upon a fact which was proper to be tried in *Ireland*, and not here, our law differing from the law in *Ireland*; it was replied by the plaintiff's counsel, that the courts of law in *England* were proper expositors of the *Irish* laws; nay their judgment is to controul the opinion of the judges in *Ireland*, as upon all writs of error; and *a fortiori* may they take upon them to judge of a matter or expound a law, that comes before them in the first instance; and that there is no difficulty in trying here, whether this be the same *Fitzgerald* or not; it may be done here as well as in *Ireland*. And as touching the act of Settlement, though the same be copiously penned, and hath the words, *trusts*, *equities*, &c. and that all shall be actually vested in the King; yet the construction of that act is natural and plain, and must be taken *reddendo singula singulis*, that is to say, lands in possession vest absolutely in possession, a trust vests as a trust, and the like, and amounts to no more than that they shall be as much in the King's actual possession, as if an office was actually found; and so has it been resolved here upon other statutes of attainders, that have as liberal clauses as this act of Settlement has.

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1 Mod. 16. The case of *Smith* and *Wheeler* in the *King's Bench* concerning *Simon Maine's* estate, being the first case there settled by the Lord Chief Justice *Hales*. Lord *Holland's* case on the statute of *H.* 8., and *Powly's* case.

After long debate, the judges concurring with his Lordship, that the Court had a proper jurisdiction in this case, and that the judges in *England* were proper expositors of the *Irish* laws, and that by the true construction of this statute the trust was vested in the *King*, and not the land itself, and the proof being full as to the identity of the person, decreed for the plaintiff, as to one moiety; the trust

Judges in England proper expositors of the laws in Ireland.

as to the other moiety being for Sir *Morrice Eustace* himself, and not for *Fitzgerald*. (1)

(1) The history of *Ireland*, with reference to its courts of Justice, and their dependence on the *English* Government, may be shortly gathered from the 4th Inst. Tit. of the Kingdom of *Ireland*, p. 348. Pryn. on the 4th Inst. p. 249. 2 Pryn. Rec. 85. 7 Rep. 23. 1 Bl. Com. 100. Poyning's stat. 10th Hen. VII. 6th Geo. I. cap. 5. which was thought to be but declaratory of Poyning's law. 22 Geo. III. cap. 53. 23 Geo. III. cap. 28. and the late Act of Union, [39 & 40 G. 3. c. 67.]

DE

TERMINO S. HILLARII. [423]

2 & 3 *Jacobi II.* 1686.

IN CURIA CANCELLARIÆ.

The EARL of KILDARE *versus* Sir MORRICE EUSTACE & Al.

Case 399.
25 *Januarii.*
Lord Chancellor.
Lord Chief Justice Beddingfield.
Lord Chief Baron Atkins.
Ante Case 377. 398.
Post Case 404. 411.

THE defendant having obtained an order for the re-hearing of this cause, Mr. *Pollexfen* argued for the defendant, singly as to that point, that by the act of Settlement not only the trust, but the lands themselves, as this case was, were actually vested in the King, and consequently what title the plaintiff had, was purely a title at law, and not a trust or equitable title; and put the case shortly thus, (*vis.*) that Sir *Morrice Eustace* being an innocent protestant was possessed of the lands in question for the remainder of a term for years in trust for *Fitzgerald* being an innocent papist, and that the lands in question were actually seized by the late pretended common-wealth, and the *custodiam* of them granted. (1) And the fact was admitted so to be, and was so stated in the plaintiff's bill.

(1) The process by *custodiam* upon outlawry forms a considerable branch of the civil administration of justice in *Ireland*. Upon an application to the

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And first he observed that if the words of the act would bear it, it was but reasonable that the estate in law should vest and go along with the trust, it being no prejudice to any one: the trust being the substance, and the estate in law but as it were the shadow. *2ndly*. That the design of the act was the establishing the possessions of these forfeited lands, and to make the title unquestionable; which intent is best answered by vesting, not only the trust, but the lands themselves; and the act is fully and liberally penned for that purpose. That these lands are actually vested by the enacting clause, *viz*. all land whereof any soldier or adventurer was in possession, or whereof the *King* was in possession, or whereof the *custodiam* was granted, or that was seized or sequestered by the pretended *Common-wealth*, or that any person by or under their title or by reason of the late war received the rents or was in possession on the *seventh of May*, 1659. Now the description of having the *custodiam* granted, of having been seized and sequestered, &c. comprehended the lands in question. That as to the objection, that the vesting words must be taken *reddendo singula singulis*, that is, that lands in possession shall be vested as lands in possession, a trust of land vested as a trust, &c. *that* may hold of lands not included within those particular descriptions; but to apply such construction to such lands so described, were to render all those particular descriptions and the main body of the act fruitless and nugatory. That the particular exception in the proviso, as to protestants' estates, strengthens the vesting clause as to the lands and trusts of innocent papists: and that the particular penning of this act distinguishes this case from all the cases upon other *English* acts for forfeitures.

Sir *John Holt* argued for the plaintiff, that this Act of Parliament was made for these special purposes.—1*st*. To supply the defect of attainders. *2ndly*. The want of inquisition and default of office. *3dly*. That trusts in *Ireland* were not forfeited before this act; nor were the trusts of inheritances in *England* forfeited before the *stat*. 33 *H*. 8., as is resolved *Co*. 7 *Rep*. *fol*. 34, and insisted on the

1 Mod. 16.

Court of Exchequer by motion, after the inquisition on the *capias utlagatum*, the lands of the defendant are granted by that court to the plaintiff by *custodiam*, in the nature of a lease, reserving a small rent to the crown. See 4 Inst. 111. *Vernon* and *Scriven's* Reports, title, *Custodiam*. *Conroy's Treatise upon Custodiam*, and Reports of Cases upon that Subject. This process is noticed by Lord *Hardwicke*, *Hedges* v. *Cardonnel*, 2 Atk. 408.

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case of *Smith* and *Wheeler*, and that a trust shall vest as a trust only, and that where a traitor was to have an estate on performance of a condition, there notwithstanding the vesting clause the King must perform the condition. And as to the exception, a cautionary proviso cannot enlarge the enacting part.

The *Lord Chancellor* inclined, that the estate in law as well as the trust was actually vested; but recommended the case to the Judges for their further consideration.

COCK *versus* BURRISH.

Case 400.
26 *Januarii*
Lord Chancellor.

A. devises the surplus of his estate to his two nephews, equally to be divided between them, and appoints his executors to lay it out for their benefit. One of them died in the testator's life-time.

J. S. makes his will, and the defendant *Burrish* and another executors, and devises to them legacies of 20*l.* a-piece, and likewise devises to them 800*l.* in trust for the payment of several annuities to *A.*, *B.* and *C.* for life, (1) far exceeding the interest of the 800*l.* and devises the surplus of his estate to his nephews *Charles Cock* and *John Cock* equally to be divided betwixt them, and appoints the same to be paid to his executors, in trust to be laid out for the benefit of the residuary legatees. One of the residuary legatees dies in the life-time of the testator, and the other happens likewise to die within two years after the testator's death.

The whole decreed to the survivor and not to the executors, the testator not intending them any benefit.

The first point was, whether, in regard by the devise of the surplus *Charles* and *John Cock* were tenants in common and not joint tenants, the survivor should have the whole surplus. And the Court decreed him the whole; the design of the will shewing the testator chiefly intended their benefit, and not any advantage to his executors, who were in a manner strangers and but remotely related; and the rather for that, though the devise is not wholly joint, but several by the words *equally to be divided;* yet in the latter clause, where he appoints the executors to lay out the money for their benefit, there it is joint again. (2)

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(1) The words of the devise are, "For these uses (*viz.*) that the said "defendants, the executors, should "pay to *A.*, *B.* and *C.*" as in printed report, R. L.

(2) If one devises to two and their

Cock v. Burrish.

A. gives 800*l.* to his executors on trust to pay annuities to *B.* and *C.* for their lives, exceeding the interest of the 800*l.* and gives the surplus of his estate to *D.* and *E.*—

A second question was, whether, the annuities being determined by the death of the annuitants, what remains of the 800*l.* should go to the executors, or to the surviving residuary legatee. Decreed also with the plaintiff, it not being a conditional devise to them of 800*l.* paying such and such annuities, but only deposited in their hands in trust for the payment thereof: and as they were no way obliged to pay more than the 800*l.* so there is no reason that they should have the benefit of what remained unexhausted of the 800*l.* in payment of the annuities. (1)

The annuitants being dead, the 800*l.* shall go to the residuary legatees, and not to the executors.

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heirs, and one die *in vitâ testatoris*, the survivor shall have all, *Edlestone* v. *Speake*, 1 Show. Rep. 91. But in the case of a clear tenancy in common, the executors in trust could, in such case, have no claim, and share of legatee dying in testator's life-time, would be subject to the Statute of Distributions, *Bagwell* v. *Dry*, 1 P. Wms. 700. So *Page* v. *Page*, 2 P. Wms. 489. Et vide *Barker* v. *Giles*, ibid. 280. *Hunt* v. *Berkeley*, Mos. 47. Eq. Ca Ab. 243, pl. 4, S.C. [*Skrymsher* v. *Northcote*, 1 Swan. 566.] As to the surplus undisposed of by the will, where legacy given to executors, vide *Foster* v. *Munt*, post 473, and cases cited in not. there.

(1) Reg. Lib. 1686. A. fol. 280.

Case 401.

28 *January.* *In Court.* *Master of the Rolls.*

DUNN *versus* ALLEN.

Eq. Ca. Ab. 2, pl. 2. S.C.

A purchaser or assignee, who comes not in in privity, is not entitled to bring a *scire fac.* to revive a decree.

The plaintiff purchased the manor of *Lenthall*, in the county of *Hereford*, of Sir *Sampson Eure*, who, upon articles of agreement made betwixt him and his tenants for the settling of heriots and stinting the common, obtained a decree for confirmation thereof. The plaintiff first brought a *scire fac.* to revive this decree, which was discharged by the late *Lord Keeper North*, in regard that the plaintiff, who claimed as a purchaser or assignee, and comes not in in privity, is not entitled to bring a *scire fac.* to revive the decree, (1) but the

(1) So an assignee can in no case bring a bill of review, sic dict. arg. *Barbon* v. *Searle*, ante 417. So where assignees of a bankrupt die or are discharged, and others are put in their room, they cannot revive, but must bring a supplemental bill, there being no privity, or at least but an artificial one, between a bankrupt and his assignees, *Anon.* 1 Atk. 88, but on filing a supplemental bill they shall have the benefit of the proceedings in the suit

same was discharged without costs, for that the defendant did not demur to the *scire fac.* as the *Lord Keeper* said he might have done.

DUNN v. ALLEN.

A demurrer may be put into a *scire fac.* to revive a decree.

And now the plaintiff brought his bill to revive the decree, and prayed no other relief; to which the same objection was made, as had been before to the *scire fac.* the plaintiff being no more entitled to bring a bill of revivor than a *scire fac.*; there being no other difference betwixt them, save only that a *scire fac.* lies, when a decree is signed and enrolled, and a bill of revivor upon an abatement before such time as the decree is signed and enrolled: but an assignee or a purchaser, who come not in in privity, can in no case revive; but ought to bring an original bill to have a parallel decree made; in which it may be used as a good argument or inducement to the court, that there was such former decree, to make a like decree, if no sufficient reasons are shewed to the contrary: but the former decree can no ways [427] be revived, nor carried into execution, save only by the making a parallel decree; and the plaintiff hath now no such bill: and this was the objection as to the form; and as to the matter, it appeared of the plaintiff's own shewing, that this agreement was made only betwixt persons that were bare tenants for life; for on the one hand Sir *Sampson Eure*, the lord of the manor, was but tenant for life; and on the other hand the tenants were but likewise tenants for life, by settlements made precedent to these articles, on which the decree was founded; so their agreement could in no sort bind, on the one hand or the other, the persons who upon the respective deaths of the tenants for life became tenants in tail.

A decree for confirming an agreement between the lord and his tenants for settling heriots and stinting the common revived by a bill brought by a purchaser, who did not come in in privity, and confirmed, though the lord and his tenants were only tenants for life. But *quære.*

But the *Master of the Rolls* (1) was of opinion, that these articles tending to settle the customs of the manor, which

commenced by the old assignees, *Anon.* ibid. 571. So plaintiff permitted on motion to revive (though not intitled) because opposed by answer, and not pleaded or demurred to, *Harris* v. *Pollard*, 3 P. Wms. 348. But good title to revive ought nevertheless to be shewn, ibid. A devisee may bring an original bill in nature of a bill of revivor, and shall have the same advantage of a decree as an heir or executor, and the defendant is not at liberty to make a new defence, *Clare* v. *Wordell*, post 2 vol. 548. Et *vice versâ*, for he cannot be in a better condition than the heir, *Minshull* v. *Lord Mohun*, ibid. 672. N. B. The practice is to revive in all cases indiscriminately by bill, Mit. Tr. 54, 5. (3d Ed.)

(1) Sir *J. Trevor.*

DUNN v. ALLEN.

were immemorial, and before the statute *de Donis*, and for stinting the common and preventing suits, ought to bind the issue in tail, though made only by the tenant for life: (1) and he would not presume, that the tenant in possession would do any thing in prejudice of the tenant's right: and decreed that the former decree should be confirmed, and revived and executed. *Quære.* (2)

(1) Et vide *Rothwell* v. *Widrington*, post 456. Where feme covert, after the death of her husband, under the circumstances, bound by an inclosure, to which he claiming in her right, had agreed in his lifetime.

(2) "And for that the said articles "were naturally binding to the pre- "mises, as well as to the persons, and "that therefore no act being recipro- "cally done between the lord or te- "nant, since the making of the said "articles and decree, they remain in "full force and virtue, and that Mr. "*Dunn's* title to the said manor and "premises, being for good and valu- "able consideration, he is well enti- "tled to have an execution and per- "formance of the said articles and de- "cree, and the said decree is, and doth "hereby stand revived and *confirmed;* "and the plaintiff having brought se- "veral actions at law against the de- "fendants, the same were stayed by "injunction." Reg. Lib. 1686. A. fol. 1100.

Case 402.

29 *January.*

In Court.

Master of the Rolls.

Eq.Ca.Ab.221, pl.6. S.C.

Voluntarybond after marriage to make a jointure to a wife, husband accordingly makes a jointure. Wife gives up the bond, the jointure is evicted.

BEARD *versus* NUTTHALL.

THE plaintiff's husband after marriage enters into a voluntary bond to settle a jointure of the value of —— on his wife, and afterwards settles lands of that value upon his wife in jointure, and thereupon the bond was delivered up to be cancelled. The husband dies, and the jointress is evicted. The bill was that the wife being administratrix of her husband might retain of her husband's personal estate against the defendants, who claimed a share of the personal estate upon the statute of Distributions, to the value of her jointure; there being no creditors in the case. (1)

The jointure shall be made good out of the husband's personal estate.

(1) So a settlement after marriage, in favour of wife and children, by a person *not indebted* at the time, and free from any badge of fraud, good against subsequent creditors, and not within 13 Eliz. though the settlor afterwards becomes indebted, *Stephens* v. *Olive*, 2 Bro. Ch. Rep. 90. *Lord Townsend* v. *Windham*, 2 Vez. 10. But a settlement after marriage being voluntary, is fraudulent against a purchaser, under stat. 27 of Eliz. (husband not indebted at the time, though immaterial), *Evelyn* v. *Templar*, 2 Bro. Ch. Rep. 148. For the distinction, in this respect, between the 13th Eliz. as relating to creditors, and the 27th of Eliz. as relating to purchasers, vide *Lord Townsend* v. *Windham*, 2 Vez. 10. *Brown* v. *Carter*, 5 Ves.

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The Court ordered that in regard the plaintiff was now become entitled to dower, that she should proceed at law for recovery thereof, and what the same should fall short in value of the jointure, should be retained by her out of the personal estate, notwithstanding the bond was after marriage and voluntary, and delivered up to be cancelled: for an agreement, though voluntary, under hand and seal, ought to be decreed by this court: (1) and the delivery up of the bond by a feme covert could no way bind her interest.

862. And for the leading cases upon the stat. 27 Eliz., vide Mr. Heald's argument in *Brown* v. *Carter*, ibid. 868. [See also *Holloway* v. *Millard*, 1 Madd. 414. *Battersbee* v. *Farrington*, 1 Swan. 106.]

(1) Vide *Villers* v. *Beaumont*, ante 1 vol. 100, and cases cited in not. there. *Naldred* v. *Gilham*, 1 P. Wms. 577. *Randal* v. *Randal*, 2 P. Wms. 467, where the principal case cited arg. So equity will not set aside voluntary conveyance, without power of revocation, in favour of a subsequent will, *Boughton* v. *Boughton*, 1 Atk. 625.

MARCH *versus* BENNETT.

Case 403.

1 *Februarii.*

In Court. Master of the Rolls.

Whether the court will decree satisfaction of a bond-debt of the ancestor out of the profits of the real estate during the minority of the infant heir, where there is a deficiency of personal assets.

THE bill was to be relieved against an old bond entered into by the plaintiff's father, on which the plaintiff was now sued as heir to his father; and it appearing that the plaintiff's father left no personal estate, but left an estate in fee simple of 300*l. per annum*, which descended to his son, who was then but *two* years old, the *Master of the Rolls* took it to be a strong objection, that in almost twenty years time this debt was never demanded of the heir: (1) to which it was answered, that during the plaintiff's minority they had no remedy, nor could compel the infant's guardian to pay the debt out of the profits of the infant's estate; nor was ever any such decree made in this court. But the *Master of the Rolls* declared he thought such decree to be just and equitable; and if such case came before him he would decree satisfaction out of the profits of the infant's estate. *Sed dubitatur.* (2)

(1) The date of the bond was 8th June, 1659. R. L.

(2) An issue was directed whether the said bond or how much thereof is satisfied or not. Reg. Lib. 1686. B. fol. 268. And per Cur. guardian is not compellable to apply the profits of the estate of infant heir, to pay off the bond debts, *Waters* v. *Ebrall*, post 2 vol. 606. Sed vide contra as it seems, *Chaplin* v. *Chaplin*, 3 P. Wms. 366. But he may, without direction of the

court, pay the interest of any real incumbrance, and also the principal of a mortgage, because that is a direct and immediate charge on the land, but not any other real incumbrance, *Dennis* v. *Bald*, 1 Ch. Ca. 156. *Palmer* v. *Danby*, Eq. Ca. Ab. 261-2. But guardians may be decreed to pay off a judgment with the profits of infant's estate, *Brissenden* v. *Decreets*, 2 Ch. Ca. 197. But where a guardian borrowed money of *A.* to pay off an incumbrance on infant's estate, and promised to give a security, but died without giving any, though *A.*'s money was duly applied, yet the court would not decree him satisfaction out of infant's estate, *there being no contract or agreement*, *Hooper* v. *Eyles*, post 2 vol. 480. *Kirk* v. *Webb*, Pre. Ch. 84.

Case 404.
4 Februarii.
Lord Chancellor.
Lord Chief Justice Beddingfield.
Lord Chief Baron Atkins.
Ante Case 377. 398, 399.
Post Case 411.
[*429]

The EARL of KILDARE *versus* SIR MORRICE EUSTACE.

THIS cause coming on this day to be re-argued, there were two points made by the plaintiff's counsel: 1*st*. Whether the estate in law was executed by the act of Settlement. 2*dly*. Admitting it was so, yet whether the *defendant having no right to one moiety, as appears by his own answer, either in law or equity, the plaintiff ought not to have a decree for that moiety.

As to the first point, the *Lord Chief Baron* seemed still to doubt, whether the estate in law was executed by this statute: but the *Lord Chief Justice* and *Lord Chancellor* were clear of opinion, that by the particular penning of this statute, not only the trust, but the estate in law, was actually vested in the king, and well granted to the plaintiff's trustees. (1)

As to the second point, it was insisted on by the counsel for the plaintiff, that he ought to have a decree for the moiety; for that it appearing by the defendant's own answer that he had no title thereunto (taking *Fitzgerald*, who was the owner of this estate, to be one and the same person with *Fitzgerald* who was the nocent and forfeiting person, (as was clear by the proofs in the cause he was the same person) it was then against conscience to suffer the defendant, who had the good fortune at law to obtain a verdict for the whole, to take out execution thereupon, and to put the plaintiff about to try his fortune at law again; and the rather for that it had been a doubt, and there were different opi-

(1) Afterwards the *Lord Chief Baron* thought the estate in law absolutely vested in the King, so the *Lord Chancellor* of that opinion, post 438.

nions amongst the judges in *Ireland*, whether the estate in law was vested in the King or not: and though it is objected that where a man has a title at law he ought to pursue his legal remedy, and shall not have a decree in equity; (1) yet that is not always so; and the daily practice of this court in many cases is otherwise: as where a creditor by bond or the like brings his bill for a discovery of assets, and having proved assets here, he shall have a decree for his debt, and not be put to prosecute at law for the same; (2) and in many such like cases the court never sends the plaintiff to law where a title appears for him: and besides in this case there was a necessity of a decree for the plaintiff against his trustees, who were only patentees in trust for the plaintiff: and it appearing to the court that he had a title against all the other defendants, the decree ought to be uniform, and made against them all: and this the court thought reasonable: but in regard this matter was new, and had not been before under consideration, the court took time to consider further of it, and to hear what the defendant's counsel had to say to it.

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(1) Vide Mitf. Tr. 95, 6. et seq. (3d edit.)

(2) So where a bond taken in trust, the trustee refuses to let his name be made use of, the court will decree the duty, and not an action to be brought in the trustee's name, dict. arg. post 438. S. C.

EARL of WINCHELSEA *versus* NORCLIFFE.

Case 405.

Eodem die. In Court. Lord Chancellor. Lord Chief Justice Beddingfield. Lord Chief Baron Atkins. Ante Case 375. Post Case 410.

THE Lady *Winchelsea* having issue by her former husband Sir *John Wentworth*, two sons, *viz. Thomas* the eldest son, and *John* her second son, settles the lands in question to the use of herself for life, remainder to *John* her second son, and his heirs, he paying unto *Katherine* her daughter 1,200*l.* within six months after the estate should fall in possession; provided if *Thomas* the eldest son should die without issue, so as his estate should come to *John*, that then if *John* did not within *six* months afterwards pay 1,500*l.* to *Katherine*, the lands should go to *Katherine* and her heirs. *Thomas* dies without issue, so that his estate came to *John*, who was under age and neglected to pay the 1,500*l.* and in truth the lands were not worth that money; and *Katherine*

EARL OF WINCHELSEA v. NORCLIFFE.

being dead without issue, the question was between the *Earl of Winchelsea* the administrator of *Katherine* his daughter, and dame *Elizabeth Finch*, sister and heir of Dame *Katherine*.

The plaintiff insisted that this was only in the nature of a security for money, and that consequently he became entitled thereunto as administrator; and the defendant insisted, that it was not a bare security for money, but rather in the nature of a settlement, and a plain limitation of the estate over upon default of payment at the day appointed, and that therefore she ought to have this estate, as being [431] heir at law to Dame *Katherine;* and the rather for that *John*, who had the title of redemption in case the estate was redeemable, desires not to redeem the same.

The *Lord Chancellor*, with the concurrence of the Judges, dismissed the plaintiff's bill, declaring it was not in the nature of a security for money, but a settlement with a plain limitation over upon default of payment to Dame *Katherine* and her heirs; and the plain intention of the party appears to be upon the face of the deed, by the different penning of the two provisoes, that in the latter case the land itself, in default of payment, should go over to the Lady *Katherine* and her heirs: and to make this a redeemable estate was to destroy the known difference in the law-books, between a condition and a limitation over. (1)

(1) Vide *Earl of Winchelsea* v. *Wentworth*, ante 402, and cases cited in not. there.

Case 406. LORD HOLLIS *versus* LADY CARR & Al'.

5 *Februarii. In Court. Lord Chancellor.*

Eq.Ca.Ab. 139, pl. 3. S. C.

One devises his lands for payment of his just debts. Testator, while a student at *Cambridge*, had been by surprise prevailed upon to give a covenant for payment of a portion to his sister; but afterwards the testator all along contested this debt; yet decreed this to be a debt to be paid within this general provision. *Ante Case* 135.

THIS cause coming on this day to be heard again, and the plaintiff by his now bill seeking relief upon the will of Sir *Robert Carr*, who had devised his lands for payment of his just debts, it was insisted for the defendants, that the plaintiff's debt was not within the intent and meaning of this provision for payment of debts; that Sir *Robert Carr* always obstinately opposed the payment of it, and looked upon it, that he was surprised and circumvented in the covenant ob-

tained from him, when he was but just come of age, and a student at *Cambridge*, for the payment of his sister's portion, to which he was no way liable: and that therefore he always refused to levy a fine, whereby to subject his lands for payment of it, although he was decreed so to do. And they cited the case of *Hollis* and *Norden*, where a debt, that the party had always contested to the last, was by the Lord Keeper *North* adjudged not to be within the intent of a provision made by a person for payment of all his just debts. And such provisions have not been extended to all sorts of debts: as debts that arise by a misfeazance, as an escape or breach of trust, which were contracted *malâ fide*, have never been taken to be within a general provision made for payment of debts.

LORD HOLLIS *v.* LADY CARR.

[432]

Debts arising by a misfeazance, as for an escape or breach of trust or contracted *malâ fide*, not within a general provision for payment of debts.

Lord Chancellor. Sir *Robert Carr* has devised his estate for payment of all his just debts, and the plaintiff's debt must now be taken to be such, the law has said it is a just debt; (1) and had not Sir *Robert Carr* devised his lands for the payment of his debts, they would have descended on his heir, and been assets in her hands, and liable to have satisfied the plaintiff's demand on Sir *Robert Carr's* covenant; and therefore decreed the debt with interest.

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(1) So it has been held, if one by will or deed subjects his lands to the payment of his debts, debts barred by statute of Limitations shall be paid, for they are debts in equity, and the duty remains, per *Cowper*, Lord Chancellor. *Anon.* Salk. 154. pl. 3. *Vaughan* v. *Guy*, Mos. 245. *Legastick* v. *Cowne*, ibid. 391. *Andrews* v. *Brown*, Pre. Ch. 385. *Gofton* v. *Mill*, post 2 vol. 141. and so the doctrine seemed to be settled. But in the case of *Blakeway* v. *Earl of Strafford*, 2 P.Wms. 373., and *Jones* v. *Earl of Strafford*, 3 P. Wms. 89. and several cases, it was considered as shaken, nor does it appear to have been considered as settled in *Oughterlony* v. *Powis*, Amb. 231, 13th May, 1754. although in *Lucon* v. *Briggs*, July 11, 1744. 3 Atk. 107., *Lord Hardwicke* is reported to have said, "I have often wondered how this rule "(i. e. the rule for reviving the debts) "at first prevailed, and Judges have "always grumbled at it though it is "now established in equity," and the reporter follows this with vide *Lord Strafford's* case in the House of Lords, Feb. 7, 1727. [But see *Burke* v. *Jones*, 2 V. & B. 275, where the cases on this subject are reviewed, and it is determined that such a devise does not revive a debt barred by lapse of time before the testator's death.]

Case 407.

STAPLETON *versus* SHERRARD.

Eodem die. In Court. Lord Chancellor.

Ante Case 299. 311.

Post Case 446.

THE matter in question concerned the right and distribution of the personal estate of an inhabitant of the province of *York*, who died intestate.

Per Cur'. The saving in the statute for Distribution of Intestates' Estates goes only to the customary part, and the testamentary part is out of the custom, and must go in a course of administration, and be distributed according to the statute.

Case 408.

HAMOND *versus* HICKS.

Eodem die. In Court. Lord Chancellor.

A. and *B.* being about to marry surrender their respective copyhold estates to the use of them two and the survivor. The man dies before the marriage, and the woman enters on his land, and after thirty years quiet enjoyment she was decreed to surrender to the heir and account for the profits.

UPON a treaty of marriage, the man and woman having each of them copyholds of inheritance, they mutually surrender the same to the use of them two and the survivor of them, and before any marriage was had the man happens to die. Upon his death, which was about *thirty* years since, the woman by virtue of the man's surrender enters on his copyhold estate, and enjoyed the same ever since. The heir of the man now brought this bill to have the estate resurrendered, and for an *account of the profits, insisting, that the marriage never took effect, and that it was a trust for the husband and his heirs until the marriage took effect.

[* 433] The *Lord Chancellor* decreed a resurrender, and an account of the profits from the death of the man. (1)

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(1) It being a principle of equity, that the statute of Limitations does not bar a trust, *Lord Kingsland* v. *Lord Tyrconnel*, 1 Vin. Ab. 186, pl. 10. But this is only as between trustee and *cestui que trust*, not against a trustee by implication, and as such affected by an equity, *Townshend* v. *Townshend*, 1 Bro. Ch. Rep. 554. *Llewellyn* v. *Mackworth*, Barnard. 445, cited there. [See *Cholmondeley* v. *Clinton*, 2 Mer. 357. 2 J. & W. 138. 190., where all the cases upon this point are discussed.]

ASPINWALL *versus* CASE & Al'.

Case 409.
8 *Februar.*
In Court.
Lord Chancellor.

Sir *Gilbert Ireland*, by deed executed in his lifetime, makes a lease for 500 years to *six* trustees therein named, with a power to make leases for 21 years, or three lives, at any time within one and thirty years after the death of Sir *Gilbert* and his lady, and the survivor of them; and this is thereby declared to be in trust for the payment of his debts, and that the surplus should be to and for such purposes as he should by his will direct and appoint; and gives to two of the trustees that were intended to be the acting persons 20*l. per ann.* for their pains; and there is a proviso, that if such person to whom the inheritance should belong, should confirm such leases as should be made by the trustees, and undertake the payment of such debts as should be then unpaid, the term for 500 years should cease, &c. And by will of the same date, reciting the deed and power to dispose by will, appoints that the trustees should have the surplus to be received by profits and raised by leasing within the 31 years after the decease of Sir *Gilbert* and his lady and the survivor of them, without account, and devises the reversion to the plaintiff for life, and to his first and other sons in tail.

The plaintiff by his bill offered to pay all the debts, and sought to be relieved against this power in the trustees for making leases during the 31 years. And for the plaintiff it was insisted, that this was a very strange and unusual sort of settlement, and upon the face of it appeared to have been [434] a surprize upon Sir *Gilbert* by the contrivance of Mr. *Entwisle*, who drew the conveyance; and the principal matter intended by the deed appeared to be only a provision for payment of Sir *Gilbert's* debts, and settling the reversion upon his kindred and relations, and that the trustees should have no other benefit save only the 20*l. per ann.* provided by the deed itself; there being no mention in the deed that Sir *Gilbert* intended to do any thing for the benefit and advantage of the trustees: and should the trustees be suffered to make leases for 21 years or *three* lives, according to the power of the deed, it will be a vain and idle provision that is made for the plaintiff for life, with remainder to his first and other sons in tail; for the trustees in the last year of the 31 may fill up estates for 21 years or *three* lives; so that

ASPINWALL v. CASE.

in probability neither the plaintiff nor any son of his will have any benefit by it; and the court might with justice, when the plaintiff offered to pay the debts, restrain the trustees in their power to lease; and some proof was offered tending to an ill practice in Mr. *Entwisle* in the making and contriving of this settlement.

Lord Chancellor. Sir *Gilbert* has expressly given the surplus of the profits to the trustees, and I cannot take it from them; he might have given his estate to a *fiddler* for a song; and I know Sir *Gilbert* was in doubt which way to dispose of his estate, and that he had a personal kindness and friendship for some of the trustees, and no good opinion of the plaintiff; and therefore pronounced a dismission of the plaintiff's bill. But afterwards a proposition was made by the plaintiff's counsel, and accepted of by the defendant, who was then in court, that the plaintiff should take upon him the payment of the debts resting unpaid, and should pay the trustees for their own benefit 600*l.* and they not to account for any profits already received, and that thereupon the plaintiff should have the estate and interest of the trustees assigned unto him.

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[435] Case 410.

19 *Februar. In Court. Lord Chancellor. Master of the Rolls. Lord Chief Baron Atkins. Mr. Justice Lutwich.*

Ante Case 375, 403.

Eq. Ca. Ab. 262, pl. 4. S. C.

Trustees of an infant having saved 3,000*l.* out of the profits of his estate lay it out in a purchase of lands lying near the infant's estate, with the consent of his grandmother; declaring the trust for the benefit of the infant, if he when at age shall agree to it. Infant dies within age; the trustees shall account to the infant's executors for the 3,000*l.* but the profits of the land set against the interest.

EARL OF WINCHELSEA *versus* NORCLIFFE.

THE case was, that the trustees of the estate of *Thomas Wentworth*, an infant, having a sum of 3,000*l.* in their hands, which they had raised out of his real estate, invested the same in lands, which lay commodious to the infant's estate, and took the conveyance thereof in their own names, but thereby declared the trust to be for the benefit of the infant, in case the infant, when he came of age should accept the same at the rate they had bought the estate, and discharge them of the 3,000*l.* and this was done with the consent of the grandmother, who was the infant's guardian. The infant died under age, and the question now was, whether the heir of the infant should have those lands, or whether the purchase should be left upon the hands of the trus-

tees, and they to account to the administrator of the infant for the 3,000*l.* (1)

Mr. Justice *Lutwich*. Neither the heir nor the administrator have any title to the lands; here was only a bare election in the infant, in case he had lived to come of age, and that election cannot now be made; and therefore he held, that the trustees were accountable to the executor or administrator for the 3,000*l.*

Lord Chief Baron *Atkins*. Of the same opinion.

Master of the Rolls differed from the Judges, and held that the heir of the infant ought to have the land; and observed that the 3,000*l.* was not taken out of the infant's personal estate, but had been raised and saved by and out of the profits of his real estate; (2) and that the trustees had acted honestly and for the benefit of the infant; and that it was but reasonable they should have such a power in them: for a purchase of lands, that lie commodious to a man's estate, may not be always to be had; and here being no creditor in the case, he thought the heir ought to be preferred before the administrator: and took notice of the case of *Dennis* and *Badd*, (3) cited at the bar, where the committee of an ideot had bought in a mortgage that was upon the ideot's estate, and the estate descended to another ideot; and though the mortgage was kept on foot by an assignment in trust, yet in that case it was decreed on a bill brought by the committee, that the lands should go to the heir, and that the mortgage should not be taken as personal estate; and an heir shall by the course and justice of this court have the personal estate applied in ease of the real, and to discharge mortgages, though there be no covenant for payment of the mortgage money. (4) And in case the trustees had come to this court, and shewn how it would be for the benefit of the infant to have had this money thus laid out, he did not doubt, but that the court would have decreed it accordingly. [436]

Lord Chancellor concurred in opinion with the Judges, and held that the trustees must account for the 3,000*l.* to the executor; and said there was a plain difference betwixt

(1) Vide *Audley* v. *Audley*, post 2 vol. 192. Where the committee of a lunatic invest part of his personal estate in the purchase of lands in fee, the lands so purchased to be sold and the money to go to the next of kin.

(2) *Sed quære*, whether this would make any difference. And see the case of *Kirk* v. *Webb*, Pre. Ch. 84.

(3) 1 Ch. Ca. 156. Eq. Ca. Ab. 261, pl. 1.

(4) Vide *Wynne* v. *Littleton*, ante p. 4. *Turner* v. *Crane*, ante p. 170, and cases cited in note there.

EARL OF WINCHELSEA v. NORCLIFFE.

this case, and that of *Dennis* and *Badd*; for in that case had the money come to the hands of the executor, yet in his hands it would have been liable in equity to the debt due by mortgage, and the heir should have compelled him so to apply the same: so that there the trustees did no wrong or prejudice to the executor, nor more than what the executor himself might have been compelled to have done. And he did agree that if the trustees had come to this court and had obtained a decree for the investing this money in a purchase, this court would have maintained its own decree: but not having so done, but voluntarily put an election in an infant, who never made any, he thought they remained accountable for the 3,000*l.* as being part of the infant's personal estate; (1) and said the matter that had been pressed at bar by Mr. Serjeant *Rawlinson*, had not been answered, *viz.* that the infant at *seventeen* years might dispose of his personal estate, though he could not of his real; but if his trustees at their pleasure might turn and convert his personal estate into a real, they thereby would debar the infant of the right and privilege which the law gave him, and might at their pleasure advance the heir, and prevent an infant from providing for his younger children, which was unreasonable; and therefore decreed the trustees to pay the 3,000*l.* to the administrator, with interest only according to what they had made by the profits of the purchased lands.

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Those of the half blood shall share equally with them of the whole blood in the distribution of an intestate's personal estate.

Ante Case 375.

Another matter, which was made a doubt of in this case was, whether those of the half blood should have an equal share of an intestate's estate with those of the whole blood; and the court unanimously agreed that those of the half blood must have an equal share; though the *Lord Chancellor* said, that till the case of *Smith* and *Tracy*, 27 and 28 *Car.* 2, at *Doctors' Commons*, they gave but half a share to one of the half blood, and it was so done in the case of one *Brown*; but since the case of *Smith* and *Tracy* that matter has been settled; and those of the half blood have always had an equal share with those of the whole blood; and *Coke* upon *Littleton* distinguishes betwixt those of the half blood as to descents; (2) but as to administration and personal estates they are all one. (3)

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(1) Vide *Noel* v. *Robinson*, ante 94.

(2) Co. Litt. 14 a.

(3) Some of the lands were purchased in 1676, and the remainder in 1681, and it was agreed and so ordered that the whole should be sold, and that the produce of such sale, together with the rents received since the time of purchase respectively, and to be received till the time of the sale,

should go and be accounted for as part of the personal estate of the infant. R. L. But where the will gives a power to the executor to act for the infant's benefit, he may lay out part of the personal estate of the infant in lands in the name of the infant, *Terry* v. *Terry*, Pre. Ch. 273. So guardian of infant paid off a mortgage out of his personal estate, and afterwards infant died; and on bill to have back the money, court denied relief, *Zoach* v. *Lloyd*, cited in *Awdley* v. *Awdley*, post 2 vol. 192. Et vide *Witter* v. *Witter*, 3 P. Wms. 101. But it is clear that in general a guardian or trustee shall not alter the nature of the infant's property, so as to change the right of succession to it, in case of the infant's death, unless by some act manifestly for the advantage of the infant at the time, vide the cases referred to by Mr. Cox in the above case of *Witter* v. *Witter*. Nor will equity bind the inheritance of the infant by any discretionary act, *Taylor* v. *Phillips*, 2 Vez. 23. A guardian, nevertheless, may exercise his discretion in altering the property, and if clearly done for the benefit of the infant this will support him in it, *Pierson* v. *Shore*, 1 Atk. 480, in which case, however, power was given to the guardian to make purchases for the benefit of the infant, *Mason* v. *Day*, Pre. Chan. 310, there cited. *Inwood* v. *Twyne*, Amb. Rep. 419. N. B. In a MS. case cited in *Oxendon* v. *Lord Compton*, 4 Bro. Ch. Rep. 235. *Baron Smythe* says, "It is a principle not "only as to lunatics but infants, that "no part of their property during their "incapacity, can be changed to the "prejudice of the successor. This "principle is proved in many cases." But the court will, under circumstances, alter the property of the infant, though no authority for it by the will, *Lord Ashburton* v. *Lady Ashburton*, 6 Ves. 6. [But where the court changes the property of an infant from personal to real, it will take care that the power of the infant over it during his minority shall not be affected, *Ware* v. *Polhill*, 11 Ves. 257. And see *Webb* v. *Shaftesbury*, 6 Madd. 100. Where the court changes the property of a lunatic, it will not regard the effect of the change as between real and personal representatives, *Ex parte Phillips*, 19 Ves. 118.]

EARL of KILDARE *versus* EUSTACE.

Case 411.

Eodem die.

In Court. Lord Chancellor.

Master of the Rolls.

Chief Baron Atkins.

Ante Case 377. 398, 399. 404.

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THIS cause standing this day again in the paper to be heard, it was insisted for the plaintiff, that let the vesting point be one way or other, the plaintiff had a proper case for a decree; for that he had apparently a right, at least to one moiety; and though in case the estate in law vested in the *King*, so that his patentee had a proper remedy at law to recover the right; yet there being a just occasion to come into this court, (as there was in regard that the Lord *Clare* was the patentee in trust for the plaintiff) when the court by that means is possessed of the cause, and the right fully examined to here, the court will not after that send the plaintiff to law. This court never decreed a suit, when it might decree a remedy, as in the case of a devise of land, or where a bond is taken in trust and the trustee refuses to let his name be made use of, the court will decree the duty, and

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not an action to be brought in the trustee's name. And the defendant *Eustace* cannot in reason oppose a decree; for if the estate in law be in him, he confesses it to be only a trust; and if it be not in him, he cannot be prejudiced; for he disclaims to have any interest: and the Judges in *Ireland* having held, that the plaintiff could not recover at law, because the estate in law was not in the *King's* patentee; and the court of equity in *Ireland* having refused to decree for the plaintiff, because they were of another opinion, and thought the plaintiff had a proper remedy at law; it would be hard for this court, when they were satisfied the plaintiff had a plain right, to send him to law. And as to the objection that it could not properly be tried here, whether the *Fitzgerald* that is the *cestui que trust*, was the same person with the *Fitzgerald* that forfeited, there was little reason in that objection. In the case of *Burnewell* and *Rochford*, *Rolls Abridgment* fol. 597, a trial was directed touching a feoffment of lands in *Ireland*; which certainly was much more local than the point in question.

Lord Chief Baron *Atkins* upon reading the second act of Settlement was of opinion, that the estate in law absolutely vested in the *King*, and not that the trust only vested; but yet notwithstanding thought the plaintiff might have a proper case in equity, in case a plain right appeared for him: but he now doubted, whether this court would direct a trial, whether the *Fitzgerald* that was the nocent or forfeiting person, and the *Fitzgerald* that was the *cestui que trust*, was one and the same person.

[439] *Master of the Rolls*, as to the vesting point, thought the acts of Settlement were not like the statute of Henry VIII. &c. and that this case differed from the Lord *Sheffield's* case and *Dowdale's* case, for there the vesting is for the King's use, but by the act of Settlement the King was to take nothing to his own use, but was in the nature of a trustee, though contrary to the general received opinion, that the King cannot be a trustee: (1) but in the main he was of opinion that the trust only vested. And as to the question whether the person that forfeited and the *cestui que trust* was one and the same person, he thought the evidence was full and plain, that it was the same person. In *forty-two* he was outlawed

(1) The King is considered as *quasi* a trustee in the case of a lunatic, *Robert's* Case, 3 Atk. 369. That the King may be considered, in this court, a royal trustee, vide *Penn* v. *Lord Baltimore*, 1 Ves. 453.

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by the name of *Fitzgerald* of *Christian* town; the lease in trust was made by *Fitzgerald* of *Lady* town; and the inquisition found that *Fitzgerald* of *Christian* town was afterwards of *Lady* town: but in case the court doubted of that matter, he thought this court might well direct a trial at law.

Lord Chancellor was satisfied, upon perusal of the act, that the estate in law vested in the *King*; but that the plaintiff might notwithstanding be proper for a decree; and took it, that this court might very well direct a trial, whether the person that forfeited and the *cestui que trust* was one and the same person; and cited Sir *William Tyrringham's* case, who being so powerful that right could not be had against him in the county of *Bucks*, the *venue* was changed upon a bill brought here purely for that purpose:(1) and he took the point in this case rather to be, whether there was ground for him to doubt whether it was the same person; and therefore declared, in case the defendant would not consent to try that matter here, he would decree it without more ado: and thereupon a trial was directed by consent to be had in the county of *Salop*: but with this at the instance of the *Chief Baron*, that in case the verdict went for the plaintiff, it should be without costs, but if against him, he should pay costs.

Venue changed upon a bill brought in this court for that purpose only.

(1) Vide *Ewelme Hospital* v. *Andover*, ante 266, contra. Vide *Barbone* v. *Brent*, ante 176.

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Case 412.

CARPENTER *versus* CARPENTER.
WASBORNE *versus* DOWNES.

23 *Februar. In Court. Lord Chancellor.*

Eq. Ca. Ab. 114, pl. 6. S. C.

Common recovery suffered or fine levied by *cestui que trust* of an estate tail has the same effect in equity, as it would have at law, in case the legal estate was in him.

IN these cases it was resolved, that where a common recovery is suffered, or a fine levied by *cestui que trust* in tail, it shall have the same effect, and avail as much in this court, and bind the trust in the same manner as the same would the estate in law, in case he had the legal estate in him: and as to a fine, it had never been doubted since the case in Lord *Bridgman's* time. And it has been held by some, that even a bargain and sale enrolled by *cestui que trust* of an es-

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tate tail should bind the issue, in regard that such a trust is not within the statute *de Donis*. (1)

A. on his marriage agrees and gives bond to settle lands for the benefit of his wife and their issue, and afterwards aliens part of those lands. Jointress decreed to have the deficiency of her jointure made good out of the inheritance of the lands remaining unsold. But that decree was reversed. Where the jointress, and the issue claim by the same settlement, they shall contribute proportionably in the discharge of any prior incumbrance on the estate.

And in the case of *Carpenter* and *Carpenter*, the husband upon his marriage had agreed and given bond to settle particular lands to the use of himself for life, remainder to his wife for life, remainder to the issue of that marriage in tail; and the husband having afterwards aliened and sold part of these lands, the wife had obtained a decree in the Lord *Nottingham's* time to have the full value of the estate she was to have for her life, supplied and made good to her out of the lands remaining unsold, and that the inheritance of those lands should be subjected thereunto: now upon a rehearing the *Lord Chancellor* reversed that part of the decree, for the jointress and children are equally purchasers; and the wife must not have all and leave nothing for the children, but they must bear the loss in proportion; and so in any case where the issue and jointress claim by the same settlement, if there be a prior incumbrance, the jointress shall contribute and bear her proportion, and not hold over and lay the whole burthen upon the heir. (2)

(1) Vide *North* v. *Way*, ante 13, and cases there cited.

(2) So where devise to *J. S.* of certain lands and to testator's heir at law of other lands, and testator dies indebted by bond, though such devise be clearly void, as to the purpose of making the heir take otherwise than by descent, yet quære if in such case the lands devised to *J. S.* and those devised to the heir shall not contribute in proportion to pay the bond debts. Vide note in *Chaplin* v. *Chaplin*, 3 P. Wms. 367.

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Case 413.

24 *Februar. In Court. Lord Chancellor.*

PITT *versus* EARL of ARGLASS.

A man cannot bring a new bill of review after a demurrer allowed to a former bill of review.

THE plaintiff having brought a bill of review to reverse the decree obtained by the defendant, the defendant demurred thereunto; and the plaintiff being satisfied that the opinion of the Court would be against him, moved, that he might dismiss his bill, and obtained leave to make the motion when the demurrer came to be argued; and now moved accordingly: but the Court denied the motion, and allowed the demurrer: and so the plaintiff was catched, who de-

signed only delay; but was now barred from bringing any new bill of review. At law after errors assigned the court will not give leave to discontinue a writ of error. (1)

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Ante Case 124. 126.

(1) And on the argument of the motion it was prayed, that the plaintiff's counsel would instance in what they would amend their bill, and the plaintiff's counsel not instancing any one particular wherein they would amend, and it appearing to the court that the bringing the proceedings on the bill of review, was merely for delay, &c. Reg. Lib. 1686. B. fol. 342. Vide *Dunny* v. *Filmore*, ante p. 135.

TRINITY COLLEGE in CAMBRIDGE *versus* BROWNE. Case 414.

Eodem die. In Court. Lord Chancellor.

THE bill was to discover the best beast of *cestui que trust* of a college lease: the defendant demurred, for that the best beast of the *cestui que trust* could not be taken for a heriot; and it also appeared of the plaintiff's own shewing that the tenants, who had the estate in law in them, were yet living. The demurrer was allowed. (1)

An heriot is not due upon the death of *cestui que trust*, but of him that has the legal estate.

(1) The case as made by the bill was, that the plaintiffs were seised of the manor and rectory of *Shitlington* in *Bedfordshire*, with a court baron to the parsonage, that there were several tenants who held their copyhold lands by fine uncertain, at the will of the lord, on death or alienation, and that paid heriots on the deaths of the tenants, whose lands were heriotable. It stated a surrender of a heriotable copyhold estate, 26th Feb. 1657, to defendants *Burgoyne* and *Gray*, of *Lincoln's Inn*, their heirs and assigns, and their admission, that Sir *Samuel Browne*, one of the Justices of C. B. was the real purchaser of the estate, and paid the purchase-money, and received the rents, and since his death defendant *Thomas Browne*, his son and heir, enjoyed the estate, and also held freehold estates, for which he paid plaintiffs quit rents. That *Burgoyne* and *Gray* were unknown to plaintiffs, and lived remote, and if they should die in remote parts, the homage could not present their deaths, and plaintiffs would lose a fine and heriots, as they had done by Sir *Samuel Browne* not dying seised, and their copyhold estate would by unity of possession be swallowed up in defendant *Browne's* freehold. And the bill asked what was the best chattel Sir *Samuel Browne* died possessed of, and prayed a commission to examine witnesses and to perpetuate their testimony, that defendants *Burgoyne* and *Gray* might surrender the copyhold estate to defendant *Browne*, and on his admission the plaintiffs might be paid their fine due on the death of his father and the heriot. To this bill the defendant *Browne* put in an answer and demurrer. The answer general namely, as to so much as, &c. and admitted his father's purchase, and answered some other parts of the bill and then followed the demurrer as to so much of

the bill as sought a discovery of Sir *Samuel Browne's* best chattel, and prayed that *Burgoyne* (the surviving trustee) might surrender, &c. for that it appeared by plaintiffs' shewing they had always a tenant of the copyhold of their own admittance, and all fines, fees and quit rents had been duly paid, and neither Sir *Samuel Browne* nor defendant had ever been admitted tenant, and that by their own shewing the custom of the plaintiffs' manor was, that heriots (if any due) were only payable after the deaths of the copy-hold tenants. The demurrer was over-ruled. Reg. Lib. 1686. B. fol. 271. N. B. The above state of the case taken from the bill and answer. Et vide *Wirty* v. *Pemberton*, 2 Eq. Ca. Ab. 279. pl. 1. But this court would not entertain a bill for discovery, who was of best ability in the manor to answer a heriot, *Lord Montague* v. *Dudman*, 2 Ver. 399.

Case 415.

Eodem die. In Court. Lord Chancellor.

PARRY *versus* ROGERS.

A man cannot bring a bill to examine witnesses in *perpetuam rei memoriam* to establish his title, until he has made it good by a verdict at law; if he is under no impediment of trying his title at law.

THE bill was to examine witnesses, to preserve their testimony touching the title of certain lands in the bill mentioned. The defendant demurred, because there was no impediment that hindered the plaintiff from trying his right at law; and that he had not obtained any verdict in affirmation of his pretended title. Demurrer allowed. (1)

(1) Vide *Bechinall* v. *Arnold*, ante 354.

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Case 416.

Eodem die. In Court. Lord Chancellor.

LECONE *versus* SHEIRES.

Eq. Ca. Ab. 260, pl. 1. S. C. *A.* indebted to *B.* by deed grants the guardianship of his child to *B.* and covenants not to revoke it, and dies. Equity will not set aside the deed unless the debt be paid, or the trust abused.

THE father of the plaintiff the infant being indebted to the defendant, by deed granted him the guardianship of his children, with a covenant not to revoke the deed, and gave a bond of 500*l.* penalty to perform covenants. The bill was to bring the guardian to an account, and to remove him: and though the guardian being present in court produced the deed, and was ready to deliver up the same, in case the Court should so order or direct; yet in regard there was a just debt owing to the defendant from the father of the infant, the Court declared they would not restrain the guardian from receiving the rents and profits of the infant's estate, but only from abusing his person.

Note.—The statute is, that the father may by deed grant the guardianship of his children from time to time. *Vid. Stat.* 12 *Car.* 2. *cap.* 24. *sect.* 8. (1)

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(1) Vide Co. Litt. 87 b. not. (1) 89 a. not. (11).

ADDISON *versus* HINDMARSH.

Case 417.

Eodem die. In Court. Lord Chancellor.

THE bill was to be relieved touching certain lands which the plaintiff claimed title to, as heir on the part of his father. The defendant pleaded that the mother was the purchaser of those lands, and that the defendant was heir on the part of the mother; but it not being pleaded, that the defendant was heir of the whole blood to the mother, (and in fact he was only of the half blood to the mother) for that reason the plea was over-ruled.

Eq. Ca. Ab. 38, pl. 11. S. C. The defendant pleaded himself heir on the part of the mother, and did not say he was heir of the whole blood. Plea over-ruled.

Note. In a bill by way of appeal from an inferior court, the plaintiff therein must complain of the injustice done him by the inferior Court; but is not obliged * to assign any particular errors; which is the difference betwixt a bill of appeal and a bill of review: but in this they agree, *viz.* that both must be upon the same evidence; and you cannot examine *de novo;* (1) though in the spiritual courts they examine over and over again, and proceed upon new allegations.

Upon a bill of appeal from an inferior court you need not assign particular errors, as you must do upon a bill of review. But you cannot examine *de novo* upon either of those bills. Though in the spiritual court they examine over and over again upon new allegations.

And the *Lord Chancellor* seemed to incline that a bill of appeal would lie from an inferior court to the Court of *Chancery*, (2) as at common law the *King's Bench* corrects all inferior courts. [*443]

(1) So on appeal from the court to the House of Lords, *Thompson* v. *Walter*, Pre. Ch. 295. But in an appeal from the Rolls to the *Lord Chancellor* the decree is open, and the party at liberty to read new proof, *Wright* v. *Pilling*, ibid. 496. So provided he will give up his deposit, *Hedges* v. *Cardonnell*, 2 Atk. 408. Note, after a decree, and affirmed on a re-hearing at the Rolls, between the same parties, an appeal lies to the *Lord Chancellor*, vide *Brown* v. *Higgs*, 8 Ves. 561.

(2) As to superior and inferior courts, vide *Strode* v. *Little*, ante 58.

An appeal lies to the *Duchy* court from the Court of Equity at *Lancaster*.

Note, That from the court of Equity at *Lancaster*, an appeal by act of parliament lies to the *Duchy* Court. (1)

(1) Et vide *Omerod* v. *Hardman*, 5 Ves. 725.

Case 418.

ENGLEFEILD *versus* ENGLEFEILD.

1 *Mati.*
In Court.
Lord Chancellor.

If a contingent remainder is destroyed by a legal conveyance, and that conveyance is obtained by fraud, equity will relieve against it.

Post Case 419.

Sir *Thomas Englefeild*, the plaintiff's father, was seised of an estate for his life in the reversion of two estates, the one in *Leicestershire*, and the other in *Wiltshire*, each of about the value of 1,800*l. per annum*, expectant upon the death of two jointresses, remainder to his first and other sons in tail, remainder in like manner to his next brother the now defendant; and though he was thus entitled to the reversion of these great estates expectant on the death of the jointresses, (Sir *Robert Howard's* lady having all the *Wiltshire* estate in jointure, and Dame —— *Englefeild* all the *Leicestershire* estate in jointure to her) yet he had little or nothing in present, and had been some time in prison for debt; and having formerly been married, but never had any issue, and being sixty years old, and not intending to marry again, the *Wiltshire* estate was sold to Sir *Robert Howard*, and out of the purchase-money 2,500*l.* was paid to the defendant for his interest therein. And the now defendant agreed with Sir *Thomas Englefeild*, his elder brother, to pay him down in hand 600*l.* and to pay him 500*l. per annum*
[444] during his life, to commence from the death of the Lady *Englefeild* the jointress, whose estate the defendant also bought in (for without her, the plaintiff's father having barely an estate for life expectant on her death, he could not make a good tenant to the precipe) and after several treaties had, at last a final agreement is made (wherein Sir *Jeffery Palmer* was consulted) between the two brothers upon the terms aforesaid, and Lady *Englefeild's* estate being bought in, a common recovery was suffered, and fines levied, and the defendant was in actual possession of the estate. After this Sir *Thomas* marries a young wife, and by her in his old age has issue the now plaintiff, and then brought a bill in the Lord Keeper *Bridgeman's* time to be relieved

against this agreement, and the conveyance made pursuant thereunto; thereby suggesting, that he was defrauded and circumvented; which bill was to the same effect with the plaintiff's now bill; and upon a solemn hearing that bill was dismissed. (1)

And for the defendant it was now strongly insisted, that although the plaintiff comes in as a remainder-man, so that in strictness a dismission of the plaintiff's father's bill is not pleadable in bar to the now plaintiff's bill; yet certainly, if there were not ground to relieve the father, the now plaintiff cannot be relieved upon any pretence of fraud, which was personal: and if any fraud was done to any one, it was to the father, and not to the plaintiff; who was not then in being; nor was his estate of any consideration in the law; but was purely contingent, and well and sufficiently destroyed by the common recovery before the plaintiff was born. That the contract and agreement was made by the consent of all the friends and relations, and with great deliberation; Sir *Jeffery Palmer* having been all along consulted in it, and done by his advice, and was reasonable and natural; Sir *Thomas* being then *sixty* years of age, never having had any child, though formerly married, and then a widower, and wanted a present subsistence. That the badges of fraud assigned by the plaintiff, received, as they thought, a clear [445] answer, and were in issue in the former cause, and now after *twenty* years enjoyment under this agreement and purchase, it was insisted, there was little ground for the plaintiff to destroy it upon pretence of fraud, (2) when the fraud, if any, was in relation to the plaintiff's father only, whose bill was dismissed; and the plaintiff's contingent estate well and sufficiently destroyed by a legal conveyance: and his father might, if he had pleased, have given this estate to his brother, and the plaintiff could never have avoided it.

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(1) It appears that an order, dated 18th February, 34 Car. II. was obtained for dismissing the bill, but that by an order dated 27th April, 2nd Jas. II. it was ordered that the bill should be retained. The said bill was filed during the life of *Lady Englefield*, the jointress. R. L.

(2) But no length of time will bar a fraud, *Cottrel* v. *Purchase*, Forrest. 61. Bacon's Tracts, 37. Sed vide distinction taken as to trusts by implication, *Townshend* v. *Townshend*, 1 Bro. Ch. Rep. 554. *Dormer* v. *Fortescue*, 3 Atk. 129. *Hercy* v. *Ballard*, 4 Bro. Ch. Rep. 468, where account of rents and profits as against trustee confined to six years. *Pettiward* v. *Prescott*, 7 Ves. 541, where account of rents and profits as against trustee confined to time of filing the bill, on account of laches in *cestui que trust*.

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The Court was of opinion, upon the reading of the articles, that this conveyance was obtained by fraud: and as to the objection that the plaintiff's estate was contingent and absolutely destroyed by a legal conveyance, that would not be material; for if the conveyance was obtained by fraud, it was the same in equity, as if no conveyance had ever been made; and therefore declared they would decree it for the plaintiff, unless better cause was shewn. (1)

(1) Reg. Lib. 1686. A. fol. 1084.

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TERMINO PASCHÆ,

3 *Jacobi II.* 1687.

IN CURIA CANCELLARIÆ.

Case 419. 6 *Aprilis.* *In Court. Lord Chancellor.* *Ante Case* 418.

ENGLEFEILD *versus* ENGLEFEILD.

THIS cause standing this day again in the paper, the defendant's counsel applied themselves principally to answer the objections made in relation to the pretended badges of fraud, and observed that whether Sir *Thomas* the now plaintiff's father was barely tenant for life without any remainder to his issue, or whether there was a remainder to his first and other sons in tail, depended only on the re-publication of a will, which was in the power of Sir *Robert Howard* to make it a will or no will; and the title was thought so doubtful, that the point upon the re-publication was afterwards tried at the bar; but that Sir *Thomas* was fully informed and apprized of his estate by the will, such as it was; and it is fully proved in the cause, that the first agreement, which was 18th *December*, was for 600*l.* and 200*l. per ann.* and it was then so far from being apprehended, that the defendant had any extraordinary bargain of it, the plaintiff's father

being then above 60 years of age, and not like to have issue, that he reserved a latitude to go off; and then *Smith* finding the defendant so indifferent in this matter, comes in, first for a third, and then for a moiety. After all this they come to a new agreement; the 200*l.* is paid, and there are covenants for further assurance, and new deeds executed, and after all this a release given. And as to the objection, that the consideration of the subsequent articles of the *twenty-first* of *September* was mentioned to be, amongst other things, that the defendant released his pretensions to the *Wiltshire* estate, it appeared that they were in time subsequent to the articles of the *twenty-first* of *September*. Engleheart v. Engleheart

As to that it was answered, that the articles of the *twenty-first* of *September* were antedated, that they might overreach *Smith*, and cut him out of his moiety; but were not in fact executed, as fully appeared in the cause, till after that the defendant had released his pretensions to the *Wiltshire* estate; and that the dismission of the plaintiff's father's bill, was there nothing else in the cause, answers all those matters. And it was observed that the plaintiff had very little ground to stand upon, and a very slender, if any, foundation to raise an equity upon; for as to an estate in law, he had none, no not so much as a right; there was never any thing more than a contingency limited to him, and that fully destroyed by a legal conveyance before he was born; and yet in respect of that alone it is, that he would be now relieved upon a supposed fraud done in the obtaining a conveyance in prejudice of this imaginary estate of his, when his father that had a real estate could not be relieved: and it was insisted, that a dismission upon hearing of the merits of a cause was as pleadable as a decree; (1) and the plea in this case was disallowed barely upon the account, that the plaintiff did not come in under his father's title, but as a remainder-man. In the case of *Roscarrocke* and *Barton*, (2) tenant for life with a remainder to another in tail was foreclosed; and after *sixteen* years time the remainder man came to redeem, but was dismissed; (3) for otherwise there would be no end of suits: as in this case, if Sir *Thomas* had seven sons, they would have all had several new springing equi- [448]

(1) *Prettyman* v. *Prettyman*, ante 310. *Sawyer* v. *Bletsoe*, post 2 vol. 328.

(2) 1 Ch. Ca. 217.

(3) Vide *Thynne* v. *Duvall*, post 2 vol. 117.

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ties. But the court varied not in opinion, and therefore decreed a reconveyance and an account of profits. (1)

(1) The Master was directed to take an account of the rents and profits, as well from the death of Sir *Thomas*, as from the filing of the bill. And after the Master's report the court would give directions how far the defendant should be charged with the said rents and profits: the defendant to be examined in respect thereof upon interrogatories. The decree relates to the *Leicestershire* estate only. Reg. Lib. 1686. B. fol. 1084.

Case 420.

18 *Aprilis.*

In Court. Master of the Rolls.

HOLFORD *versus* BURNELL.

Eq. Ca. Ab. 36, pl. 1. S. C.

A defendant held to the offer in his answer, though the circumstances of the case were varied from what they were at the time when the answer was put in. (1)

THE plaintiff's bill was, that the defendant might redeem or be foreclosed. The defendant by answer confessed the plaintiff's mortgage, and that he (the defendant) having the equity of redemption assigned to him, the better to secure a debt owing to him by the mortgagor, offered to pay the plaintiff what was due on his mortgage. This cause rested thus for some time; and afterwards the mortgagor being absconded, a bill was brought by several of his creditors against the plaintiff Mr. *Holford* and others, and in that case it appeared that the lands mortgaged to Mr. *Holford* were subject to a mortgage prior to his, and that the mortgagor had made a deed of trust of those lands amongst others for payment of his debts; and upon hearing of that cause it was decreed that the now plaintiff should be only paid in proportion with the other creditors; and not liking that decree he brought this cause to hearing on bill and answer; and in regard the lands by the deed of trust were subjected to the payment of more debts than the same were worth to be sold, the defendant would now go back from the offer in his answer, and be contented to be foreclosed.

And it was strongly insisted for the defendant, that he ought not to be so bound by this offer in his answer; but that he might notwithstanding wave it, he being content to be foreclosed; and the rather for that since the answer put

(1) Vide *Jones* and *Lenthall*, 1 Ch. Ca. 154, where a person having sworn in his answer, to avoid a sequestration, that he was satisfied a debt owing to him, in a bill now brought by him for the said debt, the *Master of the Rolls*, would not suffer that answer to be read against him.

in, the original cause was heard, and decreed that the now plaintiff should be paid but in proportion with the other creditors; and now by bringing on the cross-cause upon bill and answer, the plaintiff would vary the decree made in the original cause; and that the circumstances of the case were now much altered and varied, from what they appeared to be in the cross-bill, and from what was known at the time of the answer put in: and the plaintiff could not have a decree beyond his own bill, which was only that the defendant might redeem or be foreclosed: but notwithstanding this the *Master of the Rolls* held the defendant to the offer in his answer, and decreed him to pay the money due to the plaintiff. (1)

HOLFORD v. BURNELL. [449]

(1) Reg. Lib. 1686. A. fol. 562.

DORRINGTON *versus* JACKSON and WATSON.

Case 421.

Eodem die.

In Court. Lord Chancellor.

HIND and his wife, who was the widow and administratrix of *Colvile*, being possessed for years of a messuage called the *Three Tunns* in *Lombard-street*; the fore part by lease from Sir *Christopher Buckle*, under a ground rent of *ten pounds per ann.* and the back part by lease from the defendant *Jackson*, at a ground rent of 5*l. per ann.* the plaintiff *Dorrington* brings an action against them at law for a debt owing by the intestate *Colvile*, whereunto they appeared: and *Hind* becoming a bankrupt, and he and his wife absconding, the plaintiff obtains judgment against them at law by default, and upon a *venditioni exponas* has these terms for yeare sold unto him by the sheriff: but pending that proceeding at law, *Buckle* and *Jackson*, the head landlords, entered for non-payment of ground rent, and obtained several judgments in ejectment. *Dorrington* agrees with *Buckle* and pays him his rent in arrear, with his costs and charges at law, and accepts a new lease of him for the residue of the term then to come; and by a writ of possession upon the judgment recovered by *Buckle* is put into possession of the fore part of the messuage; and having thus *Buckle's* interest, he apprehended that *Jackson* could not dispose or make any benefit of his back part of the messuage, and there-

A. recovers judgment against *B.* and has a lease sold to him by the sheriff; *C.* the ground landlord enters, and having judgment in ejectment for non-payment of the ground rent, offers *A.* upon payment of arrears of rent and costs at law to make him a new lease for the remainder of the term. *A.* refusing this offer, *C.* lets it to another. *A.* brings his bill to be relieved against the recovery and forfeiture at law, having first tendered the arrears and costs. Bill dismissed with costs.

DORRINGTON v. JACKSON.

fore refused to agree with him on the same terms as he had with *Buckle*, and insisted to have abatements of the ground rent in arrear, &c. and pretended that the back house would be of little use to him, and that he was very indifferent whether he had it at the ground rent or not; *Jackson* hereupon agrees with the other defendant *Watson*, who was tenant to *Jackson* of a messuage in *Cornhill* which adjoined to the back part of the *Three Tunns*, (the ground on which that back part was built having formerly belonged to this messuage,) to lay this back part of the *Three Tunns* to the messuage in *Cornhill*, and for that purpose they beat down a wall and make a door into the back part of this messuage, and by nailing up the doors divide it from the fore house. *Dorrington* being thus disappointed of bringing *Jackson* to his own terms indicts him and *Watson* for a forcible entry; but they were acquitted, and having tried (but without success) other means at law to get the possession of this back house, at last tenders the ground rent in arrear and the costs and charges at law, and upon refusal of that brings his bill to be relieved against the re-entry and forfeiture at law.

Upon the hearing of the cause the case appearing to be *ut supra*, and it being fully proved in the case that *Jackson* had offered the plaintiff to accept of the same terms as Sir *Christopher Buckle* had agreed to, and that the plaintiff refused to comply with that offer, and would not pay all the ground rent in arrear with the defendant's costs and charges at law; and that before the bill brought *Jackson* had actually let this back part to *Watson*, who had been at a considerable charge in the fitting this back house for his conveniency, the court would not therefore now relieve the plaintiff, but dismissed his bill with costs to be ascertained by the defendant's own oath. (1)

This cause was afterwards re-heard, and the former decree confirmed *in omnibus*. (2)

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(1) Reg. Lib. 1686. A. fol. 524. As to this point of the costs being ascertained by the defendant's oath, vide *Childrens* v. *Saxby*, ante 207. et ante 334. *Dyer* v. *Tymewell*, post 2 vol. 123.

(2) And that the plaintiff should pay unto the defendant such full costs at law, and such further costs in this court since the last hearing as should appear on the defendant's oath, together with the 5*l.* deposit, on the rehearing to be discounted out of the costs. Reg. Lib. 1686. A. fol. 696.

Case 422.
19 *Aprilis.*
In Court.
Lord Chancellor.

TOOKE *versus* SIR ROBERT ATKINS & AL.

THE plaintiff's mother being very intimate with the defendant Sir *Robert Atkins*, and designing to make an advantage by the marriage of the plaintiff her son, who was heir to a good estate, an agreement was made between the plaintiff's mother and Sir *Richard Atkins*, whose daughter the plaintiff married, that Sir *Richard* should pay 2,000*l.* for the use and benefit of the plaintiff's mother, and nothing of a portion was paid or intended for the plaintiff; and 1,800*l.* of this money having come to the hands of the defendant Sir *Robert Atkins*, a trustee for Mrs. *Tooke*, unto whom or for whose use the defendant Sir *Robert* had long since paid the same; the plaintiff's bill was to have this money answered and made good to him, he having no other portion with his wife.

The defendants by answer insisted that this money was intended for the use and benefit of the mother, and not for the plaintiff, and the writings seemed to import as much; and the defendant's counsel insisted on the case of *Greysly* and *Lother*, in *Hob. fo.* 10, where it is adjudged to be a sufficient consideration to maintain an action that the mother would give her consent to the marriage of her child: but Sir *Richard Atkins* being examined in the cause, and in effect deposing that this money was intended as a portion with his daughter, the *Lord Chancellor* decreed for the plaintiff, and that in the first place the mother should pay as far as she was responsible, and Sir *Robert Atkins* the residue; but both to be liable to satisfy the moneys to the plaintiff.

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Case 423.
25 *Aprilis.*
In Court.
Lord Chancellor.
Eq. Ca. Ab. 233, pl. 1. S. C.

GLOVER *versus* FAULKNER.

THIS cause having been heard and referred to an account, the plaintiff afterwards moved to examine two of the defendants *de bene esse*, which was ordered, unless cause. The defendant's counsel coming this day to shew cause, took this difference, that although it was an order of course to examine a defendant *de bene esse* saving just exceptions, yet when the cause is heard and it appears such defendant is a party interested, it is proper to shew cause against such an order before the witnesses be examined.

Although it is an order of course to exa-

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mine a defendant *de bene esse*, saving just exceptions; yet when the cause was open, and it appeared that the defendants were parties interested, it was proper to shew cause against such an order before the witnesses were examined; which difference was allowed to be well taken: but it appearing that releases were given to the defendants, and the matter to be examined to being only matter of account, the cause was disallowed. (1)

(1) Reg. Lib. 1686. A. fol. 648. 18 Ves. 517. *Murray* v. *Shadwell*, 2 V. & B. 401.] Vide *Harvey* v. *Montague*, ante 126. *Callow* v. *Mime*, Pre. Ch. 234. [*Anon.*

Case 425.

26 Aprilis. In Court. Lord Chancellor.

WARDOUR & Ux' *versus* BERISFORD & Ux.

Eq. Ca. Ab. 11, pl. 2. S. C.

An account touching a personal estate being decreed, the defendant endeavoured to charge the plaintiff with a great debt due to the estate; but defendant having opened a bundle of papers relating to that demand, which had been sealed up, and left in his hands, and altered them, so that it could not be known what papers might have been taken out, the defendant's demand was for that reason disallowed.

THE plaintiff and defendant having married two daughters of *I. S.* upon his decease there were some loose papers, that concerned the account between the plaintiff and his father-in-law, put up together in a bundle, and covered with a paper tied up with a tape, and sealed by two persons then present, and delivered to the defendant *Berisford* to be safely kept, being then told they were matters of concern: and there being now an account directed of the estate of *I. S.* which was to be equally distributed between the plaintiff and defendant, the defendant demanded as due from the plaintiff to his father-in-law for diet, &c. 2,300*l.* But upon proof made that the defendant had altered the bundle of papers so sealed up, and displaced them, and that it could not be known what papers might have been taken out, and the Master having reported that the defendant had suppressed the evidences, (1) the court for that reason disallowed the

(1) This came on upon exceptions to the Master's report, the Master having reported that he was satisfied there had been a suppression and embezzlement of some pages or accounts called *Wynne's* account, (the bundle of papers before mentioned) either by the defendant *Berisford*, or with his privity, and that therefore he had foreborne making the defendant any allowance ordered by the decree; and by the decree *Lord Chancellor* declared the account called *Wynne's* account, was through the carelessness of the defendant embezzled, and therefore in respect thereof the exceptions were overruled. Reg. Lib. 1686. B. fol. 491. This is all that appears on this point in

defendant's whole demand against the plaintiff, though the defendant swore he had produced all the papers, and though the papers produced appeared to be half-yearly accounts, and related one to the other, and not one missing, but the account was thereby carried down within a little time before the testator's decease; and though the *Lord Chancellor* declared himself satisfied that all the papers were produced, yet for the reason aforesaid wholly disallowed the said demand.

WARDOUR v. BERISFORD.

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the Register's Book. Vide *Cowper* v. *Earl Cowper*, 2 P. Wms. 748. The principle of the decree in the principal case seems to be, that every thing shall be presumed in *odium spoliatoris*, vide *Childrens* v. *Saxby*, ante 207. *Dalston* v. *Coatsworth*, 1 P. Wms. 731.

NOEL *versus* ROBINSON.

Case 426.
30 *Aprilis*.
Lord Chancellor.
Ante Case 80.
Post Case 436. 453.
2 Ch. Rep. 145.
2 Vent. 358.

BY the defendant's counsel it was insisted, that by the custom of the island of *Barbadoes*, a plantation there, though it be a fee-simple estate, is in the first place liable to the payment of debts; (1) so that the owner cannot by his will so devise his plantation, but that the same will be liable to the payment of his debts: but these debts must be either debts contracted on the place, or debts contracted in *England* or elsewhere for matters relating to the plantation, &c.

And Mr. Serjeant *Maynard's* case was cited, who recovered a debt contracted here against the executor of an owner of a plantation in *Barbadoes*, and by his advice an action of *trover* was brought, and judgment obtained for the *fourth* part of a negro. (2)

But the principal point intended was, whether the defendant *Robinson*, who was the executor of Sir *Martin Noel*, who had devised this plantation to his children, having made a lease of this plantation reserving the rent to

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(1) As to the method of making a plantation liable to a debt contracted in *England*, post 460. S. C.

(2) So *Gelby* v. *Cleve*, Hill. 5 Will. and Mary, C. B. cited in *Chamberlain* v. *Harvey*, 1 Ray. 146. *Butts* v. *Penny*, 3 Keb. 785. In *Brown* v. *Cooper*, 2 Salk. 666, it was left unsettled whether negroes were inheritance or not, but in *Smith* v. *Gould*, ibid. and 2 Raym. 1274, S. C. it was decided that trover lies not for a negro, but it seems in trespass *quare captivum suum cepit*, plaintiff may give in evidence that he was his negro, ibid.

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himself, but had therein declared that the same was in trust for the children of Sir *Martin Noel*, who were the legatees, was such an assent to a legacy, as should be binding to the executor, so as that he should not have relief against the same, as to debts by him afterwards paid.

[454] And it was insisted for the defendant, that such an assent to a legacy is no ways binding, as to a creditor, the thing itself remaining in specie; but in case the plantation had been afterwards sold, it might have been otherwise. And then as it would not bind the creditors, so it would not in equity be binding to the executor himself, as to such debts as were by him afterwards paid, for as to those debts he stood in the place of the creditors, and had their equity; and the case of *Huttoft Grove* versus *Banson* and his wife and *Thomas Grove*, decreed the *fourteenth* of *December*, 1669, was cited, where one *Huttoft* by his will devised 5,000*l.* to the plaintiff, and 500*l.* to the plaintiff's sister, (who afterwards married *Banson*) and made defendant *Thomas Grove* his executor; and upon the treaty of that marriage the executor agrees that there was 500*l.* and interest due for the legacy, and that he would make that up 1,000*l.* and enters into a statute for payment, and also assigns the equity of redemption of a mortgage for further security, and dies, having much wasted the testator's estate, and without assets sufficient to make compensation. And the plaintiff's bill was, that *Banson* might have his 500*l.* legacy only in proportion with him, and it was so decreed accordingly, and the plaintiff was preferred as to the redemption of the mortgage, he having 5,000*l.* legacy, and the defendant but 500*l.* And a like case of *Nelthorpe* and *Biscoe*, where a legatee had actually received her legacy at the time it became payable, and the estate afterwards by casualty proving deficient to answer the other legacies, which were not then payable, was made to refund: and the case of *Chamberlain* and *Chamberlain*, decreed the 26th of *July*, 1664, that an assent to a legacy shall not bar a creditor, where the thing itself is remaining in specie. And in the case of *Catchmay* and *Nicholls*, where a woman that had the use of a personal estate devised to her for life, with a remainder over to another, had changed the securities and taken new bonds in her own name, it was determined that *that* should not be construed to be a *devastavit*, (1) or make her estate any way liable;

1 Ch. Rep. 148.

1 Ch. Rep. 135.

1 Ch. Rep. 256.

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(1) *Quære autem*, et vide *Barker* v. *Talcot* and *Shaw*, post 474.

and that the executor in that case was but in the nature of a trustee, and was not to be punished, where the devisee had acted fairly, and done nothing against good conscience. And besides in the principal case the assent insisted upon is not properly speaking an assent to a legacy; for the devise is of no less than the whole inheritance.

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Lord Chancellor. It is a case of consequence, and it will be fit therefore it should be well enquired into, how far a plantation in *Barbadoes* is liable to the payment of debts: but as to the actual assent to a legacy by an executor, *that* would not bind a creditor. If an executor should release a debt of 100*l.* for *one shilling*, *that* would not bind a creditor: but in case there is no other creditor, save only the executor himself, there his assent will be binding to him; as if an executor will voluntarily release a debt, he shall not be relieved against it, though a creditor should.

SAGITARY *versus* HYDE.

Case 427.

2 *Mall. In Court. Lord Chancellor.*

Eq.Ca.Ab. 142, pl. 8. Post 2 vol. 44. S. C.

A MAN makes a settlement on one of his co-heirs, with a power of revocation; the heir, before either original filed or bill brought, aliens; but before all the purchase money is paid, an original is filed and a bill brought, and notice thereof is given to the purchaser. (1)

Per Cur'. There is a difference between a conveyance with a power of revocation, and a conveyance to such uses as a man shall appoint, and he afterwards by will appoints the uses.

In the principal case there being a debt owing to the King it was ordered that the King's debt should be satisfied out of the real estate, that the other creditors might be let in to have satisfaction of their debts out of the personal assets. (2)

(1) Stat. 3 & 4 William and Mary, cap. 14.

(2) For the leading cases on the doctrine of marshalling assets, vide *Clifton* v. *Bart*, 1 P. Wms. 678. and Mr. Cox's notes to that case, in addition to which, as to marshalling in favour of legatees, *Foster* v. *Cook*, 3 Bro. Ch. Rep. 347. And no difference where legatee by a codicil, *Norman* v. *Morrell*, 4 Ves. 769. As to not marshalling for a charity, *Makeham* v. *Hooper*, 4 Bro. Ch. Rep. 155. Nor against judgment creditors, as distinct

from specialty creditors, nor where legacy charged on real estate, and payable at a future day, *Pearce* v. *Loman*, 3 Ves. 135. *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538. Nor where the personal estate ample for the payment of debts, and real estate not charged in favour of legatees, *Keeling* v. *Brown*, 5 Ves. 359. Contra it should seem in such a case as to simple contract creditors, *Powell* v. *Robins*, 7 Ves. 209. So where mortgagee of freehold and copyhold lands, the Court will marshal in favour of simple contract creditors, *Aldrich* v. *Cooper*, 8 Ves. 382, in which the doctrine of marshalling is very fully investigated. Note, that case over-rules the case of *Robinson* v. *Tonge*, cited by Mr. Cox in his note to *Clifton* v. *Burt*, ub. sup. as to this point, and which is reported, 3 P. Wms. 398, and as to the general principle of marshalling, *Trimmer* v. *Bayne*, 9 Ves. 209, which lays it down in conformity with *Aldrich* v. *Cooper*, ub. sup. that a party having two funds, his choice shall not have the effect of disappointing another who has one only.

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Case 428.

SCUDEMORE *versus* WHITE.

3 *Mall. Lord Chancellor.*

Eq.Ca.Ab. 304, pl. 7. S.C.

THE statute of *Limitations* is no plea in bar to an open account. (1)

(1) A plea in a cause in this name, is entered as over-ruled. Reg. Lib. 1686. B. fol. 467. Et vide the reason assigned, per *Lord Chancellor*, *Welford* v. *Liddell*, 2 Vez. 400. But the exception in the stat. does not extend to the case of a tradesman and his customers, *Cotes* v. *Harris*. *Wall* v. *Wyburn*, Bul. N. P. 149. Et vide Sir *William Joliffe* v. *Pitt*, post 2 vol. 694. Quære whether the exception extends to transactions between principal and agent, *Jones* v. *Pengree*, 6 Ves. 580, and cases there cited.

Case 429.

LAYER *versus* NELSON.

Eodem die. In Court. Lord Chancellor.

Where one obligee is sued, by the custom of *London* his co-sureties shall contribute.

WHERE one obligee that is a surety is sued alone, by the custom of the city of *London* he shall make his co-sureties contribute: (1) so where a surety pays a debt, and has no counter-bond, by the custom of the city of *London* he shall maintain an action against the principal.

So by the custom of *London* where a surety pays a debt, he shall maintain an action against the principal, though he has no counter-bond.

(1) So in general, *Hole* v. *Harrison*, Rep. in Ch. 15. 203. S. C. and where no counter-bond, and the money paid, he may have an assignment of the security, *ex parte Crisp*, 1 Atk. 135. Sed vide *Gammon* v. *Stone*, 1 Vez. 339, contra in the case of a bond, where money not paid, and surety made the assignment of the bond the condition of paying the money. [See note (C) to *Osborne* v. *Rogers*, 1 Saund. 264 a. (5th edit.) as to actions by sureties against their principals or co-sureties.]

ROTHWELL *versus* WIDDRINGTON.

Case 430.

4 *Mali.*

Lord Chancellor.

Eq.Ca.Ab.104, pl. 9. S. C.

A feme covert after the death of her husband bound by an inclosure to which he had agreed, it appearing that her estate was much improved by the inclosure, and that by disturbing it she aimed at an unreasonable advantage to herself.

A DECREE was made for an inclosure twenty years since, to which the defendant the Lady *Widdrington's* husband had agreed in his lifetime, and she having an estate of about 25*l. per annum* within the manor, would now disturb the inclosure: and though in strictness her husband's consent could not bind her interest, yet it being proved in the cause, that her estate was much improved by the inclosure, and that she designed only to make an unreasonable advantage to herself: the Court decreed the inclosure should stand. (1)

(1) The cause was heard on the 28th January preceding, and decree made as above. Reg. Lib. 1686. B. fol. 270, and affirmed on a re-hearing, 4th May. Reg. Lib. 1686. B. fol. 462. Vide *Conyers* v. *Tenants of Hull Hall*, Mich. 12 Geo. II. (Lib. O. 16.) So an agreement between a lord and his tenants for settling heriot, and stinting the common revived by a bill brought by a purchaser, who did not come in in privity was confirmed in this court, *Dunne* v. *Allen*, ante 426. *Ireland* v. *Rittle*, 1 Atk. 541. So an agreement for stinting a common decreed to be performed, though opposed by one or two of the tenants, *Delabeere* v. *Beddingfield*, post 2 vol. 103. Otherwise as to an inclosure, ibid. Sed vide *Bruges* v. *Curwen*, on appeal, ibid. 575. Et vide *Weekes* v. *Staker*, ibid. 301. *Arthington* v. *Fawkes*, ibid. 356.

LONGDALE *versus* LONGDALE.

Case 431.

Eodem die.

In Court.

Lord Chancellor.

Eq.Ca.Ab.109, pl. 7. S. C.

Relief denied against the breach of a condition in a voluntary settlement.

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THE father makes a voluntary settlement upon his eldest son in tail male, remainder to a second son, &c. in which is a proviso, that if his eldest son did not pay the second son 600*l.* at his age of twenty-one years, that then the estate of the eldest son both in law and equity should cease. (1) The father having afterwards married a second wife, by deed taking notice of the former settlement, and that his son had not paid the money according to the proviso, conveys the same lands to the use of his children by his last wife.

The plaintiff's bill was to be relieved against the forfeiture for non-payment at the precise day: but in regard the con-

(1) The proviso was, "that the eldest son should within two years after attaining his age of twenty-one years, pay the sum of 600*l.* to his father the settlor." R. L.

LONGDALE v. LONGDALE.

veyance was purely voluntary, and the father might have put what conditions or restrictions upon his son he thought fit; and the proviso being special, that for non-payment at the day the son's estate both in law and equity should cease, the court refused to relieve the plaintiff, and dismissed the bill; (1) and the rather for that the plaintiff had set up a release against his father, which was obtained by surprise; and the deed in law was defective, and amounted only to a declaration of trust. (2)

(1) Without costs, in case the plaintiff delivered possession of the lands in question, in pursuance of the decree, otherwise with costs to be taxed. Reg. Lib. 1686. B. fol. 425. Entered *Langdale* v. *Langdale*.

(2) It is discretionary in a court of equity whether it will aid voluntary conveyances where there is no remedy at law, dict. per *Somers*, Lord Chancellor, *Bold* v. *Corbett*, Pre. Ch. 84.

Case 432.
6 *Mali.*

Lord Chancellor.

Eq Ca. Ab. 198, pl. 3. S. C.

EYLES *versus* CARY.

THE case arose on a will, wherein was this clause, viz. *I will all my debts shall be paid before any of my legacies or gifts hereinafter mentioned;* and then devises several pecuniary legacies; and after in the same will devises lands to *J. S.* on condition to pay a certain rent to *J. N.*, and other lands to *J. S.* on condition to pay 5*l. per annum* to *J. D.* The question was whether these lands were by the will subjected to the payment of the testator's debts, or only to the payment of the particular rents thereout devised.

Per Cur'. The lands are not subjected to the payment of the testator's debts; the general clause in the beginning of the will shall be intended only of the personal estate, and the pecuniary legacies thereout devised. (1)

(1) Vide *Newman* v. *Johnson*, ante 45, and *Clowdsley* v. *Pelham*, ante 411, and cases there cited.

Case 433.
Eodem die.
Lord Chancellor.

SURREY *versus* SMALLEY.

A JUDGMENT confessed by an executor pending a bill here shall not be allowed upon an account of assets. (1)

Eq.Ca.Ab. 240, pl. 31.
A judgment confessed pending a bill here not allowed in an account of assets.

(1) In this case six several judgments had been confessed by the executor to creditors of the testator, and afterwards assigned by them to three persons, defendants in the cause, for 10*s.* in the pound, and the charges in recovering of them, and on a bill filed by creditors, for discovery of testator's estate, and to have the aforesaid judgments set aside, as obtained by fraud, all that appeared was that one of the defendants, who was uncle to the widow of the testator, another of the defendants, wrote one or two of the assignees of the judgments word to purchase the same; and the decree was, that the assignees of the said judgment ought not to be allowed any more for the said judgments than what was really paid for the assignments, in case the said judgments were obtained in an adversary way of proceeding, before the plaintiff's suit in this court. And the Master was to enquire and report how the said judgments had been obtained, and then the court would consider of the costs. Reg. Lib. 1686. B. fol. 501. Vide *Harding* v. *Edge*, ante 143, and cases there cited. Pending a bill in equity against an executor, or after a decree *quod computet*, he may pay any other debt of a higher, or of as high a nature, but this must be intended where he has legal assets, contra when he has only equitable assets, contra also where there is a final decree, *Mason* v. *Williams*, 2 Salk. 507. Et vide *Shepherd* v. *Kent*, post 2 vol. 435. *Bright* v. *Woodward*, ante 369.

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Case 434.
7 Mali.
Lord Chancellor.

PARKER & Al' *versus* TURNER & Al'.

THE question was, whether tenant in tail of a copyhold having taken a conveyance in his own name of the freehold in fee, the copyhold estate was thereby merged. The *Lord Chancellor* seemed to make little doubt but that the copyhold was merged, though it was said this point was depending upon a special verdict at law. (1)

Copyholder in tail takes a conveyance of the freehold in fee. The copyhold is merged.
2 *Chanc. r.* 174. *Ante Case* 364.

(1) In this case it appears that the grandfather of one of the defendants being tenant in tail general, with divers remainders over of the copyhold premises in question, 9 Feb. 12 Car. I. took a feoffment in fee thereof, and afterwards he and his wife levied a fine of the premises in question to the father of the defendant *Turner*, and another, who, by deed dated 10th June, 12 Car. I. declared the use thereof to be to such uses as the grandfather should by will appoint, and in default of such appointment to his right heirs; the grandfather and the trustees named in the above deed afterwards, by deed

dated 18th June, 23 Car. I. convey the said premises in mortgage, and the money not being paid, the mortgagee made her will, bearing date 25th April, 1662, and devised the premises for 21 years. Plaintiff *Parker* continued in receipt of the rent till 1678, when the defendant *Walker* having married one who was tenant at will to the plaintiffs of the premises in question, under rent, and being in possession, claimed as heir of the body of the grandfather, and the defendant *Turner* claimed to redeem, having purchased the equity of redemption under the will of the grandfather, and it was objected the copyhold was mortgaged by the feoffment, and that a fine having been levied the supposed intail was barred and extinguished. And the decree was, that inasmuch as the defendant *Turner* had no bill to redeem, and the title being in the plaintiffs, under and by virtue of the fine and assurance aforesaid, the said defendants should deliver up possession of the lands in question to the plaintiffs, to be by them enjoyed according to their several estates and interests therein, and the defendants to account for the profits of the premises, by them respectively received from the time of their entry thereupon. Reg. Lib. 1686. B. fol. 521. *Note.* The lands in question were copyhold of a manor wherein, by a custom, intails might be cut off by a common recovery, vide *Challoner* v. *Murhall*, 2 Ves. jun. 524.

DE

TERMINO S. TRINITATIS,

3 Jacobi II. 1687.

IN CURIA CANCELLARIÆ.

[459]
Case 435.
26 Maii.
In Court. Lord Chancellor.

SELF *versus* MADOX & Al'.

A. being decreed to pay a sum of money, or deliver possession of a house to *B.* by a certain day, conveys the house to a creditor in satisfaction of a real debt. This shall not defeat *B.* of the benefit of the decree.

THE defendant *Madox* was decreed to pay the plaintiff a sum of money, or deliver up possession of a house and lands in *Edmonton;* and upon the defendant's examination on interrogatories touching a contempt in not performing the decree, it came out that the defendant had made an assignment to a real creditor by bond of this house and lands for satisfaction of his debt, and that this assignment was made by *Madox* of his own free will, without the privity or knowledge of the creditor, not only pending the suit, but even after the time first set for payment of the money or delivering of the possession was expired, which time *Madox* had got enlarged

on motion, with design in the mean time to make this conveyance.

SELF v. MADOX.

The question was, whether this assignment made by *Madox* should defeat the plaintiff of the benefit of the decree.

The Court decreed the possession of the house and lands to be delivered to the plaintiff, without any regard had to this conveyance; and the case of *Goldson* and *Gardiner*, in 1680, was cited, where the court had made the like decree in the case of a conveyance made from the father to the son, prior to the decree, but pending the suit. (1) [460]

(1) Every purchaser *pendente lite*, even for valuable consideration or otherwise, and without actual notice will be bound by the decree, *Sorrell* v. *Carpenter*, 2 P. Wms. 482. *Worsley* v. *Earl of Scarborough*, 3 Atk. 392. So where a general charge of debts, though purchaser otherwise not bound to see to the application of the money, yet bound after suit commenced, *Walker* v. *Smallwood*, Amb. 676. So held as a general rule, that alienation pending a suit is void, ibid. As to what shall be reckoned a sufficient *lis pendens*, vide *Preston* v. *Tubbin*, ante 286.

NOEL *versus* ROBINSON.

Case 436.

Eodem die.

Lord Chancellor.

THIS cause coming on this day again for his Lordship's opinion, he inclined to decree it for the plaintiff; and declared that where an executor has assented to a legacy, he shall never afterwards avoid it, (1) though a creditor in such case may make the legatee refund; and as touching the making a plantation in *Barbadoes* liable to a debt contracted here, it was said, the method was by a procuration from hence under the seal of the Mayor of *London*, and getting that recorded there; or an acknowledgment of the debt by the owner of the plantation upon the place will do it.

Ante Case 80, 426.

Post Case 453.

How a plantation in *Barbadoes* may be made liable to a debt contracted in *England*.

(1) But an inventory exhibited by an executor does not finally conclude him, *Orr* v. *Kaines*, 2 Vez. 194. 4 Burn's Ecclesiastical Law, 321.

Case 437. **NEWTON *versus* ROWSE.**

30 *Mall. Lord Chancellor.*

Eq.Ca.Ab.308, pl. 3. S. C. *A.* an attorney takes *B.* as his clerk, and receives 120*l.*, and by articles agrees with the father of *B.* to return 60*l.* of the money, if he died within a year: *A.* died within three weeks.

THE defendant was executor of one *Child*, an attorney, with whom, when he lay ill of the sickness whereof he afterwards died, the plaintiff placed his son, and gave 120*l.* with him; (1) and articles were made and executed, by which it was provided, that in case *Child* died within one year, that then 60*l.* of the money should be returned. It happened that *Child* never recovered, but died within *three* weeks after sealing of the articles, and payment of the money; and the bill now was to have a greater sum than 60*l.* paid back.

The executor of *A.* decreed to pay back one hundred guineas.

The Court, notwithstanding the parties themselves had provided against accidents, and agreed for a certain sum, *to wit*, 60*l.* to be returned, in case *Child* died within a twelvemonth, and that *modus & conventio vincunt legem*, yet decreed 100 guineas to be paid back to the plaintiff the father. (2)

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(1) 120 guineas.

(2) Or so much in silver as amounts to the value thereof. It appears in the pleadings that at the time of executing the articles, the testator being indisposed the plaintiff was unwilling to seal the said articles, or pay the 120 guineas, until the said testator declared, that in case he should not live to go abroad the said 120 guineas should be returned to the plaintiff, and that he was only troubled with a cold, and hoped to be abroad in two or three days; and thereupon the plaintiff sealed the said articles and paid the 120 guineas to the said testator. Reg. Lib. 1686. B. fol. 597. As to the jurisdiction of this court, touching the return of apprentice fee, and other matters relating to apprentices, it seems doubtful to what extent it exists: in *Thurman* v. *Abell*, post 2 vol. 64, the court decreed between master and apprentice in *London*, but it appears that the indenture of apprenticeship was not enrolled, so that the matter was not properly cognizable before the Chamberlain of *London*. *Argles* v. *Heaseman*, 1 Atk. 518, was a case of master and apprentice, and the fee was 20*l.* paid, and a bond for the payment of 20*l.* more, on a contingency therein mentioned, and for performance of covenants in the indenture of apprenticeship; the contingency happened, and the 20*l.* was paid; the justices upon application for improper treatment made an order to discharge the apprentice, and refund one sum of 20*l.*, this was paid, and the order quashed in K. B., and then another order to discharge the apprentice made by the justices. The master then brought his action on the bond, and the bill was for an injunction; *Hardwicke*, Lord Chancellor, said, he had no jurisdiction, but made a decree by consent. The last case on this subject that appears, is *Hale* v. *Webb*, 2 Bro. Ch. Rep. 78. This was a case of

discharge of the indentures, by consent of the parties; it is not stated that the indentures were enrolled in *London*, but they must have been so because the parties went before the Chamberlain to discharge them; nothing was there said about the return of the premium (200 guineas) and the bill was for that return; *Kenyon*, Master of the Rolls, dismissed the bill on the ostensible ground that nothing appeared in the agreement between the parties as to the discharge of the indentures, about the return of the premium, and said the remedy, if any, lay at law for the money, and disclaimed the jurisdiction of the court in such a case, but said, that in case of bankruptcy this court could relieve, as coming under the head of accident. Vide *Ex parte Sandby*, 1 Atk. 149. *Barwell* v. *Ward*, ibid. 261. *Quære* therefore, if the death of the master or apprentice would not give the court jurisdiction? *Note*, the case 1 Salk. 68, cited in the argument in *Hale* v. *Webb*, is *Barber* v. *Dennis*, and was merely of an action for money earned by the apprentice, and the question turned on the validity of the apprenticeship. Vide stat. 5 *Eliz.* cap. 4. sect. 35, which appears to be confined to disputes betweem master and apprentice, and which by the statute are to be referred to a justice of the peace of the county, or mayor or other head officer of the town, &c. and then, if necessary, to the sessions, who may discharge the apprentice. [See also on the subject of return of Premium, *Cuff* v. *Brown*, 5 Price, 297. *Ex parte Prankerd*, 3 B. & A. 257.]

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Sir HUMPHRY MACKWORTH'S Case.

Case 438.

2 *Junii.*

Lord Chancellor.

Eq. Ca. Ab. 283, pl. 11. S. C.

A petition to the King, to direct his judges to take a fine or recovery from an infant, referred to the *Lord Chancellor*.

Sir *Humphry Mackworth* having married an heiress, petitioned the *King*, that his Majesty would be pleased by privy seal to direct his Justices of *England* and *Wales* to take a fine or common recovery, as there should be occasion, from his wife, notwithstanding her minority, she being now *eighteen* years of age, in order to the settling of her estate to the uses therein mentioned; so that the petitioner might be sure, though his wife should die (who was now big with child) of an estate for life in the premises.

The *King* in answer to a petition signified, that he was satified with Sir *Humphry's* merit, and was graciously disposed to gratify him in this matter; but however referred it to the *Lord Chancellor* to report what was fitting to be done therein: and now upon hearing counsel on both sides, one Mr. *Evans*, who had married the young lady's mother, opposed the petition; but the *Lord Chancellor* declared, he thought the petition reasonable, and that he would report the same to the *King* accordingly.

MACKWORTH'S CASE.

A fine cannot be taken from an infant, but a recovery may, by the *King's* special direction.

Note. Though the petition prayed, that the *Justices* might be directed to take a fine or common recovery, Mr. Serjeant *Maynard* observed, that the petition was inartificially drawn in that matter, for that a fine could not be taken from an infant; nor was it ever done: (1) but that a common recovery might be had, as desired, by the *King's* special direction. (2)

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(1) But it has been held that an infant trustee may levy a fine upon the act of 7th Anne, c. 19. And the Judges may take it, and it cannot be reversed but upon inspection, and during his non-age, *Ex parte Bowes*, 3 Atk. 164. So infant trustee may suffer a recovery under the statute, by order of the court, though formerly doubted, *Ex parte Bowes*, ub. sup. *Ex parte Johnson*, 3 Atk. 559. *Ex parte Smith*, Amb. 624. So an infant mortgagee or trustee, who is a feme covert, may convey by fine under the statute, *Ex parte Maire*, 3 Atk. 479, and cases cited in not. there. Note, it is said that a recovery suffered by an infant is good, and that if the court is satisfied it is for the good of the infant, it will take it, *Cecil and Others* v. *Earl of Salisbury*, post 2 vol. 225. Vide next note.

(2) But though the King grant a privy seal, yet it is in the discretion of the court whether they will permit it to pass, and the Judges do not permit it but where it will be advantageous to the infant, and though it is passed yet it is avoidable for error, *Hulbert* v. *Watts*, 1 Lord Raym. 112, and this court, under the circumstances, refused it in Sir *John St. Aubin's* Case, 2 Salk. 567. But common recoveries suffered by privy seal are now disused, and private acts of parliament universally substituted in their stead, *Hesketh* v. *Lee*, 2 Saund. 96 a. and not. there. It seems however, formerly to have been held by some that an infant might by his guardian suffer a common recovery, and said that there are many old precedents of such recoveries, nor is any mention made of special direction from the crown, by privy seal, but the court seemed to rely that the guardian was taken to be sufficient, and that he should answer to the infant for the loss if any. The *Earl of Newport* v. *Sir H. Mildmay*, Cro. Car. 307. 1 Rol. Ab. 731, 751. Sir William Jones, 318. 2 Rol. Ab. 573, S. C. So 1 Lev. 211, and in Ley. 1 vol. 83, which was by privy seal, and many precedents of recoveries by infants are stated: and see the subject discussed, the Judges being divided in opinion, *Ailet* v. *Watless*, Style 246, where *Rolle*, Ch. Justice, denied the authority of the above case of *Lord Newport* v. *Sir H. Mildmay*. And a common recovery against an infant shall not bind him, *Holford* v. *Platt*, Cro. Jac. 465, and that though he appear by guardian, *Mary Portington's* Case, 10 Rep. 43 a.

HEYWARD *versus* ROGERS.

Case 439.

4 *Junii. In Court. Lord Chancellor.*

A term was limited to *A.* for life, then to *B.* for life, then to such child as *B.* should leave at his death, and for want of such child to *C.*

Q. If the remainder to *C.* is good.

ONE *Prudence Goodwin* being possessed of a term for years settled the same in trust for herself for life, remainder to one *Rebecca Hurst* for life, and from and after* the death of *Rebecca*, to permit and suffer such child or children, as *Rebecca* should have at her death, to receive and take the profits thereof; and for want of such child or children, then in trust for the plaintiff. *Rebecca* had issue a son, who died in her lifetime without issue.

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The question now was between the plaintiff remainder-man, and the defendant, who was administrator, as well to *Rebecca*, as to the child.

It was objected, that the remainder to the plaintiff of the term in question was void, being to take place after two lives then in being, and the death of such child or children as *Rebecca* should have, who were not then in being; to which it was answered, that all this was to happen and was circumscribed to the life of *Rebecca* (to wit) in case she died leaving no issue: and the case of *Oakes* and *Chafford* was cited, and it was said, that if this child had lived to contract debts, or wanted a maintenance, it would be hard that his administrator should not have the benefit of this term: or suppose the son of *Rebecca*, though he died in the life-time of *Rebecca*, had left a son, it would be hard to carry this term from the child to the remainder-man. (1)

(1) Entered *Heywood* v. *Manning*, 1686. A. fol. 689. Vide *Thelluson* v. *Woodford*, 4 Ves. 227. and the bill appears to have been dismissed, but no case is stated. Reg. Lib.

COLLINS *versus* METCALFE.

Case 440.

Eodem die. In Court. Lord Chancellor.

Eq. Ca. Ab. 295, pl. 3. S. C.

Devise of a portion to a child with interest, but not to be paid to the child till 21. Child dies under 21. Portion shall go to the administrator of the child.

A portion devised to a child with interest, but not to be paid or payable until the child attain *twenty-one* years or was married: the child dies under *twenty-one* and unmarried: decreed the portion to the administrator. (1)

(1) Vide distinction between portion to arise out of land and from personal estate, Lady *Poulet* v. Lord *Poulet*, ante p. 204. 321, and cases there cited.

Case 441. SPENCER *versus* WRAY.

7 Junii. In Court. Lord Chancellor.

ADJUDGED, that where the suit abates, the plaintiff may either bring an original bill, or a bill of revivor, at his election. (1)

Eq. Ca. Ab. 4, pl. 1. S. C.

Where a suit abates, plaintiff may bring an original bill, or bill of revivor, at his election.

(1) The bill was for payment of legacies, and also of a sum of money, part of a marriage portion, and argued on plea and demurrer, but the point above stated does not appear in the Register's Book. Reg. Lib. 1686. B. fol. 813. Vide Mitf. Tr. 66. 88.

Case 442. HESTER *versus* WESTON.

Eodem die.

WHERE a man demurs, for that the bill contains several matters not relating one to the other, and in some whereof the defendant is not concerned; if by answer defendant doth more than barely deny combination and confederacy, he over-rules his demurrer. (1)

Eq. Ca. Ab. 40, pl. 3. S. C.

If a defendant demurs, because the bill contains distinct matters against several defendants, and answers further than denying combination, he over-rules his demurrer. *Ante Case* 395.

(1) This point is not stated in the Register's Book; it is simply stated that a demurrer was allowed. Reg. Lib. 1686. A. fol. 696. But combination must be denied, vide *Powell* v. *Arderne* & *Al'*, ante 416, but not go further, Mitf. Tr. 147.

Case 443. MEREDETH *versus* JONES.

8 Junii. In Court. Lord Chancellor.

BY articles on the marriage of the plaintiff, the plaintiff's father was to pay 50*l.* as a portion with his daughter, and the intended husband in consideration thereof was to make a settlement. The marriage was had; but before the money was paid, or settlement made, the plaintiff's husband died intestate, and she takes out administration, and thereby becomes entitled to the 50*l.* And now brings her bill against

Eq. Ca. Ab. 221, pl. 4. S. C.

A. in consideration of a portion, articles to settle a jointure, and dies before the portion paid, or settlement made. The wife takes administration, and so becomes entitled to the money, and then brings a bill against the heir of the husband to have her jointure settled. Bill dismissed, for that she was not entitled to the money and the jointure too. But *quære.*

the heir of her husband, for to have her jointure according to the marriage articles.

MEREDETH v. JONES.

Per Cur'. The plaintiff shall not have the money as administratrix, and also the jointure too, which was agreed to be made in consideration of the money, and in expectation that the husband should have received it: and therefore dismissed the bill with costs. (1) *Sed de hoc quære;* for she is entitled to these two demands in distinct capacities; and the debts may appear hereafter to exhaust the assets; and in case the husband had actually received the portion, and it had been in his possession, she would have had it as his administratrix. (2)

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(1) No case appears to be stated in the Register's Book, but simply that the bill was dismissed with costs, to be taxed by the Master. Reg. Lib. 1686. B. fol. 574. Vide *Jason* v. *Jervis*, ante 284.

(2) So where upon covenant on sale of land that vendee should enjoy, or money paid be refunded, and vendee afterwards evicted by *A.* who claims the land by virtue of a former settlement, vendee makes *A.* his executrix and dies, and *A.* decreed the land and money due to vendee on the covenant too; she claiming the one under the settlement, and the other as executrix, *Jason* v. *Jervis* & *Al'*, ante p. 286.

BALE *versus* NEWTON.

Case 444.

Eodem die.

A joint-purchaser of lands conveys his part to the use of himself for life; remainder, as to a third part, to his wife for a jointure; remainder of the whole to his infant heir in tail; and two days afterwards makes his will, and devises the same estate with other things to his infant heir in tail, but subject to the payment of his debts, in case his personal estate should not be sufficient to pay his debts, as also a legacy of 250*l.* The personal estate proving deficient to pay both debts and legacies, the end of the bill was to have the debts paid out of the land, that so the legacy might be paid out of the personal estate.

Eq. Ca. Ab. 23, pl. 3. S. C.

After a voluntary settlement a man cannot devise the same estate, though for payment of his debts.

Per Cur'. The settlement, though voluntary, is not revocable, and therefore having settled the lands, the testator had thereby disabled himself to charge the premises by his will. (1)

A settlement, though voluntary, is not revocable.

(1) Vide *Villers* v. *Beaumont* & *Al'*, ante 100, and cases cited in note there. A mortgage made after a voluntary settlement held to be good, *Sanders* v. *Dehew*, post 2 vol. 272.

Case 445.

Eodem die.

LONG *versus* CLOPTON.

If an heir or any other buys in an incumbrance, he shall not be allowed, as against a purchaser, any more than he really paid for such incumbrance.

Ante Case 329.

ON a Master's special report, to whom the account in question was referred to be taken, it was determined by the court, that an heir or any other shall not, as against a real purchaser, be allowed more on any incumbrance bought in, than what he actually paid for the same, without regard to what was really due on such incumbrance: and that where a prior incumbrancer buys in a subsequent incumbrance, with notice of an intervening security, he shall not be allowed the same: and the case of *Borough* and *Frances* was cited. (1)

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(1) Vide *Darcy* v. *Hall*, ante 49. *Brathwaite* v. *Brathwaite*, ante 334. *Phillips* v. *Vaughan*, ante 336. *Williams* v. *Springfield*, post 476. *Ascough* v. *Johnson & Ux'*, post 2 vol. 66, and cases there respectively cited.—The case by the Register's Book appears to have been, that a bill was exhibited against the defendant, as heir of his father, against whom a judgment had been obtained to discover the real and personal estate of his said father, liable thereto, and for an account of profits of the said estate; and that at the hearing, an account was directed of what had been received and paid for preceding incumbrances for principal and interest, and for charges in defence of the title; and defendant having compounded several incumbrances the court reserved the matter, whether defendant should have the benefit. And it was agreed that the incumbrances being particular and charged on several parts of the estate, some of which estates were of far greater value than the money lent thereon, over and besides all general securities that affected the same, plaintiff ought to be admitted to a redemption to such particular estates as he should think fit, and not be bound to redeem the whole; and the decree was that the defendant, though he be an heir, yet ought not to be allowed the benefit of composition to the prejudice of plaintiff's debt, but ought to be allowed what he had really paid for principal, interest, and charges, as well on account of incumbrances precedent to plaintiff's judgment as subsequent, till he had notice of said plaintiff's judgment, and that plaintiff ought not to be admitted to a redemption of any part of the estate without redeeming the whole and paying what should appear to be due to defendant upon the account; and as to the account, *Lord Chancellor* declared that defendant being charged with the rent of the lands for the time he held it, ought to be allowed taxes, repairs, and all incidental charges annually, and the costs and charges he had been put unto in relation to the title of the premises, and that defendant ought not to be charged with any rents or profits while any of the incumbrancers were in possession of the premises, or with any more than he raised or received out of said estate. Reg. Lib. 1686. B. fol. 652.

STAPLETON *versus* SHERRARD.

Case 446.

Eodem die.

Eq.Ca.Ab. 161, pl. 3. S.C.

Ante Case 299. 311. 407.

Per Cur'. The wife has a moiety of the personal estate of her husband by the custom, and another moiety of a moiety, there being no children, by the statute for *the Distribution of Intestates' Estates.* (1)

(1) Sed vide *Whethell* v. *Phelps*, Pre. Ch. 328. where distinction taken between the customs of *London* and *York*. By the former, where no children, the moiety belonging to the intestate goes according to the statute of Distributions, by the latter to the next of kin, and so certified by the Archbishop of *York*, ante 314. S. C.

ROBINSON *versus* THOMPSON.

Case 447.

10 *Junii.*
In Court.
Lord Chancellor.

Eq.Ca.Ab. 373, pl. 2. S.C.

Per Cur'. Where the major part of the part-owners of a ship settle and agree an account of the profits of a voyage, it shall conclude the rest: and the plaintiff was ordered to pay costs. (1)

An account of the profits of a voyage settled by the major part of the part owners shall conclude the rest.

(1) By the Hanseatic ordinances, 1614, the Master was to summon all the owners to pass his accounts on his return home. Vide *Strelly* v. *Wilson*, ante 297, and cases cited in not. there.

HERNE & Al' *versus* MEERES.

Case 448.

11 *Junii.*
In Court.
Lord Chancellor.

The plaintiffs were creditors of Mr. *Cox*, son of Dr. *Richard Cox* the physician, by bond, upon whom a considerable estate was settled for his life; he was outlawed, and absconded; and pending the prosecution at law against him, the defendant Sir *Thomas Meeres*, having notice thereof, purchased his estate for life, and gave between *three* and *four* years purchase for the same.

A purchase of an estate of tenant for life, who was outlawed and absconded, set aside in favour of creditors; the purchase being made at an under-value, and pending the prosecution at law against him, and with notice thereof.

The bill was to be relieved against this purchase, as being

HERNE v. MEERES.

a trust, or else it was fraudulent, it being bought at a great under-value.

For the plaintiffs it was insisted, the purchase was made with full notice of their debts, and prosecution at law; that *Cox* absconded, and was not to be met with at that very time when the purchase was made; that the purchase was at a great under-value, *to wit*, between *three* and *four* years purchase; whereas the defendant might have insured his life at 5*l. per cent.*

[466] For the defendant it was said; as to the over-value, that young *Cox* at the time of the purchase was very sickly, and his estate was not then worth more to be sold; and read some proof to that purpose: that there was no trust, but the purchase was absolute; and the plaintiffs had no *lien* on the land: the defendant had notice, it was true, but it was of things immaterial; of debts, that did not affect the land: and if notice of a bond-debt shall be sufficient to set aside a purchase, it would obstruct all sales of the estates of the persons that died indebted.

Per Cur'. The purchase is at a great under-value, (1) and huddled up in haste, and at a time when young *Cox* concealed himself from his creditors; and carries another ill circumstance along with it, which is, that the defendant is a trustee in the marriage settlement; and for him to buy the estate for life of the husband, was to take away the maintenance and support thereby intended and provided for the wife and children, on whose behalf he was entrusted; (2)

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(1) As to purchases at under-value vide *Batty* v. *Lloyd*, ante 141, and cases there cited.

(2) The subject of trustees, assignees of a bankrupt, solicitors and agents, purchasing the property of their *cestui que trust*, client, &c. has of late been much discussed, and in the result the following points appear to be fully settled, that where a single creditor, in case of bankruptcy, previously consulted as to the mode of the sale, becomes a purchaser, the sale may be set aside, and a new sale directed, and in case of no further bidding at such new sale, then to be held to his former purchase, *Ex parte Hughes*, 6 Ves. 617. So an assignee, under a commission of bankruptcy, cannot purchase for his own benefit, *Ex parte Lacey*, ibid. 628. in which the authority of *Whelpdale* v. *Cookson*, 1 Vez. 9, is doubted. So an executor cannot buy the debts of his testator's creditors for his own benefit, ibid. So *Ex parte Tanner*, *Ex parte Attwood*, *Owen* v. *Foulkes*, cited in not. there. Et vide in confirmation of the rules on this subject, established in the preceding cases, *Ex parte Reynolds*, 5 Ves. 707. *Lister* v. *Lister*, 6 Ves. 631. *Ex parte James*, 8 Ves. 337, 345, et seq. *Coles* v. *Trecothick*, 9 Ves. 234. 246, et seq. where the subject and its principles are fully considered and investigated by *Eldon*, Lord Chancellor, and from the whole this general principle seems to result, that a person clothed under whatever character, with the duties of a trustee, or so situated that he may, by virtue of that situation,

and all this with notice of the plaintiff's debts, and proceedings at law, which ought to bear some weight in this case: and though the plaintiff's securities were not such, as did immediately affect the land, yet the notice was such; and *Cox's* absconding, had he been a trader, would have made him a bankrupt, and then the defendant would have lost all his money: and so at law, where a conveyance is found to be fraudulent, the creditor comes in and avoids all without re-payment of any consideration-money; and in equity therefore, where the Court can decree back the principal and interest, there is no hurt done; and a lesser matter in such a case will serve to set a conveyance aside: the Court therefore decreed the defendant to re-convey upon payment of his principal and interest, and that all creditors, that were in equal degree, should be let in *pro ratâ*, paying their contribution; and that the defendant might not any longer stand any hazard in case young *Cox* should happen to die, the plaintiffs and such creditors as should come in were ordered by the Court to give security within *three* days to redeem the defendant. (1)

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acquire an undue knowledge of the value of the subject of purchase in question shall not, while clothed with that character, or remaining in that situation be competent to the purchase. [See also note (Y) to *Osmond* v. *Fitzroy*, 3 P. Wms. 131, (6th. Edit.) where the more modern cases on this subject are collected; and see as to purchases by creditor under an execution *Stratford* v. *Twynam*, Jacob, 418.]

(1) Reg. Lib. 1686. A. fol. 734. Vide *Heathcote* v. *Paignon*, 2 Bro. Ch. Rep. 167. (176 in not.) where the principal case is stated from the Register's Book.

BILL *versus* PRICE.

Case 449.

Eodem die.

Eq. Ca. Ab. 91, (G.) pl. 3. S. C.

THE defendant being an exchange-man had for many years past practised upon young heirs, by selling them goods at extravagant values, and to be paid *five* for *one* and more upon the death of their fathers, and had in that manner obtained from the plaintiff and two other young gentlemen, that were heirs to good estates, several securities, wherein they were bound severally and jointly in 4,000*l.* for payment of great sums of money.

Per Cur'. Decree the plaintiff's security to be delivered

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up on payment of what the defendant really and *bonâ fide* paid to him alone, and for his own proper use. (1)

(1) Reg. Lib. 1686. A. fol. 1046. The case is confusedly stated in the Register's Book, but in substance appeared to be, that the defendant agreed to deliver to a certain person goods to the amount of 1,200*l.* and to lend him 300*l.* on having good security for the payment to defendant of 1,500*l.* Whereupon the plaintiff being under age, gave a warrant of attorney for confessing judgment to that amount, which judgment was entered up by defendant, after plaintiff had obtained his age; and it appeared that defendant, by indenture of defeazance did covenant with plaintiff that if he should pay *Price*, his executors, administrators, &c. on or about, &c. then said defendant should give a warrant of attorney to acknowledge satisfaction on the record of the said judgment; and in the mean time to sue out no execution, and the bill prayed to be relieved on payment to defendant by the plaintiff of what he had really received in money or goods, and the decree was, "That it should be referred to the "Master, to examine what money or "goods the plaintiff actually received "at the time of plaintiff's giving the "warrant of attorney for confessing "judgment, or at any time since, from "defendant or his servants, and also to "ascertain the real value of such goods; "plaintiff to be examined on interrogatories, and that what the said Master shall find and certify due, plaintiff to pay same, and thereupon defendant to give warrant of attorney "to acknowledge satisfaction." Vide *Lamplugh* v. *Smith*, post 2 vol. 77. *Whilley* v. *Price*, ibid. 78.

Case 450.

JENNINGS *versus* SELLECK.

21 *Junii. In Court. Lord Chancellor.*

Eq. Ca. Ab. 381, pl. 7. S. C.

Lord of a west-country manor (his tenants refusing to renew) makes a lease of the premises to his daughter for 99 years, and afterwards sells the manor to *J. S.* who has notice of the lease, but has security that the daughter when at age should surrender. Daughter decreed to have the benefit of the lease.

THE plaintiff's father being lord of a west-country manor, and the tenant in possession of a tenement refusing to renew, the lord thereof makes a lease for ninety-nine years to the plaintiff his daughter, and afterwards sells this estate to the defendant, who having notice of this lease takes a collateral security, that the plaintiff should release within four years after she attained her age of twenty-one years.

The plaintiff's bill was for an account of the profits of the lands comprised in the lease, and that she might hold this estate during the lease, which the defendant had got into his possession and had suppressed.

For the defendant it was insisted, that this lease made by the lord to the plaintiff, his daughter, was but a trust for himself, and it was the usual method that lords of west-country manors took, when the tenant in possession refused

to renew; that they might have the estate in their own power. JENNINGS v. SELLECK.

Lord Chancellor. This lease does not appear to be a trust for the father; but I take it to be an advancement for his child; (1) and the plaintiff having purchased with notice of it, and taken a collateral security; he must make the best of his security; and therefore decreed the possession, and an account of profits. (2) [468]

(1) So where a purchase by a father, in the name of his infant son, decreed to be an advancement, and not a trust for the father, *Mumma* v. *Mumma*, post 2 vol. 19. So where infant son has a reversion settled on him, expectant on the death of his mother, *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111. Et vide *Lloyd* v. *Read*, ibid. 608, but distinction where child already advanced, *Lord Grey* v. *Lady Grey*, mentioned in *Lloyd* v. *Read*, ub. sup.

(2) From the time of the defendant's entry thereon, together with costs to be taxed. Reg. Lib. 1686. A. fol. 1100.

POOLE *versus* GUISE.

Case 451.

Eodem die.

THE bill was to redeem an estate, which had been actually extended on a judgment, so long since as in the 45th *Eliz.* For the defendant it was said, that though under an extent, a man has but an estate *quousque* the debt is satisfied, and so the same is always in its own nature redeemable; yet after this length of time, and after the estate had gone through *five* or *six* hands, it was in the discretion of the court to direct after what method the account should be taken; (1) and that the defendant ought not to account for more than the extended value: (2) but this cause went off, upon a proposition that the defendant should be allowed what he paid, and account only for what he received during his own time. (3)

After an estate has been held under an extent for a long time, and has gone through several hands, whether upon a bill to redeem, the defendant shall account otherwise than at the extended value.

(1) That length of time is now no bar in the case of mortgagee, in nature of tenant by elegit, vide *Yates* v. *Hambly*, 2 Atk. 362. Et vide *Clobery* v. *Symonds*, ante 397.

(2) An incumbrancer shall account only according to the extended value, *Marsh* v. *Lee*, 2 Vent. 338. [*Brace* v. *Marlborough*, 2 P. Wms. 493.] Et vide Com. Dig. vol. 6. Tit. Stat. Staple.

(3) It appears by the Register's Book that the defendant, Sir *John Guise*, had purchased part of the extended premises in question, and had expended in purchasing in and defending the incumbrances, large sums of money, and the decree was, "On the "plaintiff's offer to pay to the defend- "ant, Sir *John Guise*, what he hath "laid out in buying in of the extents

" and incumbrances, together with his " interest and costs, discounting what " the said defendant had made, and " received out of the said extended " premises that the plaintiff do produce " before the Master all deeds, &c. re- " lating to the premises in question, " and make out his title thereto, and " that then the Master do take the ac- " count between the parties, and see " what is due to the defendant, Sir " *John Guise*, on the said extended " premises, and what he hath laid out " and expended in buying in of in- " cumbrances, and compute interest " for the same, and allow him all such " costs as he hath been any ways put " unto in defending of suits, touching " his title to the said premises, since " his purchase thereof, and also tax " said Sir *John Guise* his costs of this " suit, and all other just allowances, " discounting and deducting all such " moneys as said Sir *John Guise* hath " any ways made or received out of the " extended premises, as well by the " casual as by the annual profits there- " of, since his purchasing the same, " and on payment thereof plaintiff to " be let into possession." Reg. Lib. 1686. B. fol. 851.

Case 452.

BRETT *versus* MARSH.

23 *Junii. In Court. Lord Chancellor.*

Eq.Ca.Ab.147, pl. 4. S. C.

A creditor by judgment and also by bond receives 200*l.* in part of the purchaser of the estate of the debtor, but gives no notice that he would apply it to the bond-debt.

On exceptions to a Master's report, to whom the account in question was referred, it appeared the defendant was an incumbrancer by judgment, and had also a debt by bond, and received 200*l.* of the purchaser of the estate in part, but gave no notice to the purchaser, that it was to be applied towards payment of the bond-debt. (1)

It shall be applied towards satisfaction of the judgment.

Per Cur'. It shall therefore be applied towards satisfaction of the judgment, the 200*l.* being part of the purchase-money. (2)

(1) The lands were purchased by the plaintiff of one *Sharpe*, the original debtor, in the judgment and bond in question, and at the time of the purchase it was agreed that 200*l.* part of the purchase-money should be paid to the defendant in discharge of his demands on the premises, and the same was accordingly paid. And it also appears that the defendant had written a letter, which was stated in the Master's report, which the Court considered so worded, as to imply the intention of the defendant, that the 200*l.* should be taken to be paid towards satisfaction of the judgment-debt. R. L.

(2) By the articles of purchase, it appears, that *Sharpe* had agreed that certain lands therein mentioned should be settled as a collateral security for securing the purchased premises from all preceding incumbrances, it was also decreed that the plaintiff should assign over such collateral security to the defendant, free from all incumbrances by plaintiff as a further security for the moneys remaining due to defendant. Reg. Lib. 1686. A. fol. 787. Vide *Heyward* v. *Lomax*, ante 24, and cases there cited. *Perris* v. *Roberts*, ante 34.

NOEL *versus* ROBINSON.

Case 453.

25 *Junii.*

Lord Chancellor.

Ante Case 90. 426. 436.

Per Cur'. A plantation in *Barbadoes* is not a testamentary estate by the laws now in force; (1) and therefore confirmed the Lord *Nottingham's* decree, which was for the plaintiff Sir *Martin Noel's* children. (2)

(1) Vide 2 Vent. 358. S. C. *Blankard* v. *Galdy*, 4 Mod. 222. 226. *Brinley* v. *Burgh*, 1 Lutw. Ent. 623.

(2) Reg. Lib. 1686. B. fol. 679.

CAPELL *versus* BREWER.

Case 454.

5 *Julii.*

Lord Chancellor.

A farmer of the excise having estate of his own sufficient to satisfy what he owed the *King*, takes out an extent in aid against a person, who owed him money, and had failed. Decreed to refund with costs.

The bill was to be relieved against an extent out of the *Exchequer*, taken out by the contrivance of a farmer of the excise, who having a debt owing him by a man that failed, procured the *King* to take that debt in aid, and by that means to defeat all the other creditors.

Per Cur'. It is become a common practice, and a great oppression in the city, that any accountant to the *King* shall sell wines upon credit at an extravagant price, and when the man fails, an execution comes, as the first process, out of the *Exchequer* at the *King's* suit, and sweeps away all; so that all other just creditors are defeated, and a commission of bankrupt rendered ineffectual; and therefore declared, that where a farmer of the excise, as the principal case was, or other accountant to the *King*, had sufficient estate of his own to satisfy the *King's* debt, and should use this trick to defeat other creditors, by getting the debt owing to him to be taken in aid of the debt to the *King*, such person should refund with costs; and decreed it accordingly. (1)

(1) The defendant in this case acknowledged that he was able otherwise to satisfy the King's debt. Reg. Lib. 1686. A. fol. 794. Vide contra *Dickinson* v. *Molineaux*, Pre. Ch. 47, with a quære by reporter. The Court of Chancery has no jurisdiction to set aside extents in aid, such causes being proper for the Exchequer, *Brown* v. *Bradshaw*, ibid. 153. So *Brown* v.

Sandys, post 2 vol. 426. Otherwise where defendant confesses he has sufficient estate of his own to pay the King's debt, ibid. For an investigation of the doctrine and cases on the subject of the interference of equity, in respect of extents in aid, vide *Phillips* v. *Shaw*, 8 Ves. 241. Note.—It is observed with regard to the principal case that the bill was only against the party that preferred himself, and the decree is only against him to refund upon the fraud, and that they do not meddle with the extent, vide *Brown* v. *Bradshaw*, Pre. Ch. 153. [Extents in aid have been greatly restrained by stat. 57 Geo. 3. c. 117.; and by rule of the Court of Exchequer, 22nd June, 1822, it is ordered, "That from hence-"forth no fiat for an extent in aid "shall be granted, unless the party "applying for the same, or some per-"son or persons on his behalf shall "make affidavit, that unless the pro-"cess of extent for the debt due to "him from his debtor be forthwith is-"sued, the debt due to the Crown "from the party applying will be in "danger of being lost to the Crown." 2 Saund. 70 d. note (*h*). 5th edit.]

Case 455.

CRESLY *versus* CARRINGTON.

Eodem die.

Lord Chancellor.

Eq. Ca. Ab. 51, pl. 2.

An award made pursuant to an order of court must be confirmed, as is done upon a Master's Report, and either side has liberty to except to it.

THE matter in difference having upon the hearing been referred by the Court to gentlemen in the *country, who had made an award therein, the cause was set down to be heard upon the matter of the award, but was thrown off as coming on irregularly, for that the plaintiff ought first to have moved to confirm the award, as is done upon a Master's report, and either side may except to it, if they find occasion; and then the matter will properly come before the court on those exceptions. (1)

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(1) And it was ordered that the certificate (award) should stand confirmed, unless the plaintiff should, within eight days then next, file exceptions thereto. Reg. Lib. 1686. A. fol. 1005. So *Hide* v. *Cooth*, post 2 vol. 109. Sed vide *Allardes* v. *Campbell*, Bun. 265. Contra *Price* v. *Williams*, 3 Bro. Ch. Rep. 163; sed vide also *Dick* v. *Milligan*, 4 Bro. Ch. Rep. 117, 536, where said exceptions to an award would lie, but not where they related to any thing that went to the facts in the award, nor where the reference was to be final, sed per Lord Commissioner *Wilson*, "I should have thought "it better to have decided that excep-"tions would not lie to an award." [See *Ford* v. *Gartside*, 2 Cox. 368.] So exceptions will lie to an award under a decree, if only *ad computandum*, but not if to all matters in difference, *Woodbridge* v. *Hilton*, Dick. 640. Et vide *Vernon* v. *Wells*, Dick. 452. [See more of the doctrine of equity on the subject of Awards in note to *Brown* v. *Brown*, ante, 158.]

husband had issue at his death, yet that issue died within the six months, and therefore the wife might elect. *Sed non allocatur*, for the husband having issue at his death, he could not be said to die without issue; so no election could arise to the wife. (1) And the case of *Goodier* and *Clark* was cited in *Siderfin, part* 1. *fo.* 102.

KETTLEBY v. ATWOOD.

(1) Where in a marriage settlement there was a proviso, that if the wife should happen to survive the husband, not having issue, or without issue lawfully begotten between them, then the wife to have power to dispose of such lands; the husband died leaving issue, which issue sometime after died without issue, et per *Cowper*, Lord Chancellor, the wife has sufficient power to sell these lands, *Holt* v. *Burleigh*, Pre. Ch. 293. Et vide *Pulteney* v. *Darlington*, 1 Bro. Ch. Rep. 223.

AWBRY *versus* KEEN.

Case 459.

Eodem die.
Lord Chancellor.

Eq. Ca. Ab. 28, pl. 6. S. C.

A. agrees with *B.* to purchase a copyhold for two lives; pays 200*l.* in part, and was to pay the remainder in three months, and then to name his lives and take up his copy; a court is held, the three months expire, and the lives not named nor the copy taken up, and *B.* dies suddenly; and the manor comes to one who was not bound by this agreement. The executor of *B.* decreed to repay the 200*l.*

THE plaintiff was tenant to Mr. *Thynne*, and contracted with his steward or bailiff for a copyhold estate for *two* lives; he pays 200*l.* down, and was to pay the residue on the taking up of his copy, which he was to do in *three* months, and then to name his two lives. A court was held accordingly, the *three* months expire, and the plaintiff neglects to name his two lives and take up his copy; and before any thing further was done, Mr. *Thynne* died suddenly, being murdered; upon whose death the manor came to the Lord *Weymouth*, by virtue of a remainder limited in a settlement, so that he was not bound by this agreement.

The plaintiff's bill was to compel the defendant, Mr. *Thynne's* executor, to refund; which was decreed accordingly, although it was insisted, that it was the plaintiff's own laches that he had not the estate. (1)

(1) It seems clear that in the performance of a contract, time is material, *Harrington* v. *Wheeler*, 4 Ves. 686. *Lloyd* v. *Collett*, 4 Bro. Ch. Rep. 469, but the judgment better reported in note to *Harrington* v. *Wheeler*, ub. sup. Yet it appears the court in its determination in cases of laches must be governed by circumstances, as to the materiality of time, with reference to the performance of a contract, ibid. Vide also *Pincke* v. *Curteis*, 4 Bro. Ch. Rep. 329. *Forrest* v. *Elwes*, 4 Ves. 492, and cases cited by Mr. *Sanders*, in his note on *Gibson* v. *Patterson*, 1 Atk. 12, which is said to

be misreported by *Lord Loughborough*, Chancellor, in note to *Harrington* v. *Wheeler*, ub. sup. [The principal case, however, does not turn upon the materiality of time in questions of specific performance. Such a performance had here become impossible, and the only question was, whether the plaintiff should be relieved against the effect of his own laches, so as to throw the loss occasioned by the lapse of time upon the defendant. Perhaps such a case would now be considered as falling within the rule that the purchaser shall receive the benefit, and must stand to the loss occasioned by casualties occurring between the agreement for a purchase and the execution of the conveyance, as to which see *White* v. *Nutt*, 1 P. Wms. 61, and the cases collected in the notes there, (6th Edit.) particularly *Paine* v. *Mellor*, 6 Ves. 349.]

Case 460.

Eodem die.

Lord Chancellor.

ALSOPP *versus* PATTEN.

Eq. Ca. Ab. 22, pl. 13. S. C.

THERE are two joint lessees of a building lease; the one agrees to sell his moiety to the other by parol for *four guineas*, and accepts a *pair of compasses* in hand to bind the bargain; the bill is to have a specific performance of the agreement.

A. and *B.* being joint lessees, *A.* by parol agrees to sell his interest to *B.* and accepts a pair of compasses in hand to bind the bargain. Whether this is within the statute of Frauds?

The defendant pleads the statute of *Frauds* and *Perjuries*: the agreement being in some part executed, the Court ordered the defendant to answer, and saved the benefit of the plea to the hearing. (1)

(1) As to the doctrine on performance of parol agreements, vide *Hollis* v. *Edwards*, ante 159, and cases cited in not. there.

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Case 461.

Eodem die.

Lord Chancellor.

WINN *versus* FLETCHER.

Eq. Ca. Ab. 37, pl. 4. S. C.

THE plaintiff entitles himself as administrator, the defendant pleads the plaintiff is not administrator. It was objected this is a negative plea. *Per Cur'*. Allow the plea: it is a good plea in abatement at law. (1)

Plaintiff entitles himself as administrator. Defendant pleads plaintiff is not administrator. A good plea in abatement in equity, as well as at law.

(1) Vide *Harding* v. *Salkill*, 1 Salk. 296, where, on action in debt against defendant as executor, he pleaded in bar that he was administrator, but disallowed.

FOSTER *versus* MUNT.

Case 462.
25 *Octobris.*
In Court. Lord Chancellor.

A. B. by will gives legacies to his children and grandchildren, and 10*l.* a-piece to his executors for their care, and makes no disposition of the surplus. Decreed the executors to be trustees for the children, as to the surplus.

JOHN MARKHAM by will devised particular legacies to his children and grandchildren, and 10*l.* a-piece to *Munt* and one *Symonds*, whom he made executors, for their care. The surplus being 5,000*l.* and upwards, the question was, whether the surplus should be a trust for the children, or go to the executors. Decreed a trust for the children. (1)

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(1) The statement of the will in the Register's Book is not particular, but seems to agree with the above, and the decree is as follows, "Whereupon, &c. "his Lordship declared that the words "in the will did amount to a declara- "tion of a trust by excluding the exe- "cutors from any property which the "law might cast upon them, it being "plain the testator never designed the "surplus of his estate should go to his "executors, for he gave them 10*l.* a- "piece for their care, and doth there- "fore order and decree, &c." and gave the plaintiffs their costs. Reg. Lib. 1687. A. fol. 25. The cases that govern the doctrine in this case are to be found in *Lady Granville* v. *Duke of Beaufort*, 1 P. Wms. 114. *Farrington* v. *Knightley*, ibid. 544, and cases cited in not. there; and also in Fonbl. Tr. Equity, Book 2. ch. 5. s. 3. in addition to which, it appears, on the head of admitting parol evidence to rebut resulting trust, on this head, that a legacy to an executor, is not conclusive to deprive him of the residue, but that parol evidence will be admitted to entitle executor having a legacy to the residue, *Clennell* v. *Lewthwaite*, and *Thornton* v. *Tracy*, 2 Ves. jun. 465, 644, where this doctrine, and the cases that govern it, are investigated and fully considered. [See also *Langham* v. *Sanford*, 17 Ves. 435. 19 Ves. 641. 2 Mer. 6, and cases there cited, *Gladding* v. *Yapp*, 5 Madd. 56. *Lynn* v. *Beaver*, 1 Turner, 63.] One executor having a legacy for his care and trouble, and declared a trustee, his co-executor will be declared a trustee also, who, however, in this case appears to have had a legacy, *White* v. *Evans*, 4 Ves. 21. But it is clear that where one executor of several is a trustee, the others are trustees also. Vide *Sadler* v. *Turner*, 8 Ves. 617. [*Milnes* v. *Slater*, 8 Ves. 295. *Griffiths* v. *Hamilton*, 12 Ves. 308.] Parol evidence not admitted where a legacy is given to executor for his care and trouble, *White* v. *Evans*, ub. sup. and said the court leans much in this respect against executors, ibid. [But where *one* only of two executors has a legacy for his care and pains, this, as against *the other* executor, only raises a presumption which may be rebutted by evidence. *Williams* v. *Jones*, 10 Ves. 77.] Where specific legacy given to one of two executors, without more, there they shall take the residue, *Colesworth* v. *Brangwin*, Pre. Ch. 323. *Mason* v. *Hawkins*, 4 Bro. Parl. Ca. 1. *Johnson* v. *Twist*, cited there and admitted arg. *Bishop of Cloyne* v. *Young*, 2 Vez. 91. *Wilson* v. *Ivatt*, 2 Vez. 166, and admitted, arg. *Mordaunt* v. *Hussey*, 4 Ves. 118. But where one of two executors named in a separate instrument from that which disposes of the residue, the testatrix directing the residue to be disposed of according to private instructions, but leaving none, executors decreed to be trustees, *Mordaunt* v. *Hussey*, ub. sup. But if *A.* be appointed executor, and other words denoting merely an office be added, as attorney or trustee, that will not take away his legal right, as executor, *Batteley* v.

Windle, 2 Bro. Ch. Rep. 31. *De Maxar* v. *Pybus*, 4 Ves. 648. Where widow of testator executrix, and having a legacy and bequest of various particulars, comprising all the testator's personal estate for life, declared a trustee for next of kin, *Martin* v. *Rebow*, 1 Bro. Ch. Rep. 154. *Zouch* v. *Lambert*, 4 Bro. Ch. Rep. 326. *Dicks* v. *Lambert*, 4 Ves. 725, although probably from the apparent hardship of the case the contrary has been decreed, *Ball* v. *Smith*, post 2 vol. 675. But bequest to executor by way of exception, held not sufficient to bar him of the residue undisposed of, *Newstead* v. *Johnson*, 2 Atk. 45. So where unequal legacies given to *A.* and *B.* and then *A.* and *B.* appointed executors, held intitled to residue, *Bowker* v. *Hunter*, 1 Bro. Ch. Rep. 328, affirmed on rehearing, ibid. 330. Executors having equal pecuniary, and equal specific legacies, were, upon the former held trustees, *Nesbitt* v. *Murray*, 5 Ves. 149. So executors having equal bequests of personal estate and unequal devises of real estate would be declared trustees upon the former, sic dict. per *Eldon*, Ld. Chancellor. *Mucklestone* v. *Brown*, 6 Ves. 64. [See also *Southouse* v. *Bate*, 2 V. & B. 396.] So where no legacy, executor, upon evident intention, declared trustee for next of kin, *Urquhart* v. *King*, 7 Ves. 225. [*Giraud* v. *Hanbury*, 3 Mer. 150.] So where express legacy to next of kin, as well as executor, the legacy to executor being for his trouble, *Davers* v. *Dewes*, 3 P. Wms. 40., and no difference where the legacy to next of kin was but *one shilling*. *Andrew* v. *Clarke*, 2 Ves. 162. *Wheeler* v. *Shear*, Mose. 288. Contra *Harper* v. *Lee*, Mose. 3. *Attorney General* v. *Hooker*, 2 P. Wms. 338. [It is now settled that a legacy to the next of kin does not exclude them, *Seley* v. *Wood*, 10 Ves. 75. *Griffiths* v. *Hamilton*, 12 Ves. 309.] Executors taking the residue as executors are joint tenants, *Frewen* v. *Relfe*, 2 Br. Ch. Rep. 220. And it seems settled that there is no distinction between specific and pecuniary legacies, *Martin* v. *Rebow*, 1 Br. Ch. Rep. 154. *Holford* v. *Wood*, 4 Ves. 80. The cases above referred to, appear to contain the material learning on this subject, but it should seem after all, that little of general principle can be drawn from them for the guidance of future decisions, as they acknowledge throughout that it is not the bequest of a legacy, or the omission of such a bequest, that will, against all contravening circumstances on the one hand, exclude the executor from the residue, or on the other give him an indefeazible title to it, with this exception, *perhaps*, that a legacy expressly given for care and pains, will universally exclude the admission of parol evidence, to shew that the testator intended the executor should have the residue. As to the state of the law on this subject, (*i. e.* of the legal right of the executor to the undisposed residue where no bequest to him) before the principal case of *Foster* v. *Munt*, it may not be wholly unworthy of observation, that the impression, either of what the law was or would have been, had the question been agitated, on the mind of *Lord Macclesfield* was, that he would in such case be a trustee, for in the *Duke of Rutland* v. *Duchess of Rutland*, 2 P. Wms. 212, he is reported to say, "The "difficulty would be to maintain that "if one should make a man executor, "without either disposing of the sur- "plus or giving an express legacy to "the executor, such executor should "have the surplus," no case is, however, mentioned, but it is remarkable that there are two old cases that seem to be express upon the point, the first is Cary, Rep. 21. 44 Eliz. 8 June, 1602, where said "Nota, that an exe- "cutor cannot be a trustee, unless he "have a special gift in the will, and "that may then be in trust; otherwise "the general trust of an executor is to "pay debts and legacies, and for the "*surplusage to account to the ordi-* "*nary in pios usus.*" The second is the case of *Brereton* v. *Roberts*, Tothil, 150, and is thus entered. "The sur- "viving executor sues the executor of "an executor, and likewise where "there is a great estate come to the "executor, which was not disposed of "by the testator, the executor shall

"not have it, but it shall be disposed of "to the testator's kinsfolk, and to cha- "ritable uses. An executor of an "executor ordered to account upon "oath, and to be examined upon in- "terrogatories to discover the estate." 6 Jac. 1608. Lib. A. fol. 638. There is also a case in Dyer, Rep. 187 b, pl. 6. In this case there were two executors, and one of the two possessed himself of the goods of his testator, and then laid out his own proper moneys in charitable and pious uses, to an amount greater or equal to the value of his said testator's goods, in repairs of the church and religious houses, *et eleemosinis pro salute animæ testatoris*, and then died possessed of the goods and made executors, against whom the surviving executor of the first testator brought an action of detinue for the goods, the defendants pleaded the payments and conversion, ut supra, and justified the detainer as the proper goods of their testator, and the plea allowed. No mention, in either of these three cases, is made of a legacy to the executors. Note, the principal case is said to have been affirmed in Dom. Proc. on appeal, 19th April, 1689. 1 Bro. P. C. 308, in margin. But on looking into the Jour. Ho. Lords, 14th vol. p. 181, it appears to be a case of *Foster* v. *Foster*, on a decree by *Lord Nottingham*, for performance of a marriage settlement, which is there entered as affirmed.

BARKER *versus* TALCOT & SHAW.

Case 463.

27 *Octobris.*

In Court. Lord Chancellor.

A. indebted to *B.* for rent. *B.* dies. *C.* administrator to *B.* *A.* gives a note for this rent to *C.* *C.* dies intestate. This note is an alteration of the property, and the rent belongs to the administrator of *C.* and not to the administrator *de bonis non* of *B.*

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The plaintiff *Barker* held a farm by lease from one *Talcot*, who dies intestate, and *Talcot* his son takes administration, and settles an account with *Barker* for the rent then in arrear, which amounted to 60*l.* *Barker* satisfied 29*l.* part thereof, by cheese, &c. and gives a note under his hand promising payment of the remaining 31*l.* to *Talcot* the son: before the 31*l.* are paid, *Talcot* the son also dies intestate, and afterwards plaintiff *Barker* pays the 31*l.* to Mr. *Shaw* the administrator of the son: after this *Talcot* the defendant takes out administration *de bonis non* to *Talcot* the father, and then brings an account against plaintiff for the 31*l.* Upon the trial the Judge doubting, whether the note given to *Talcot* the son was an absolute conversion, a verdict was suffered for the plaintiff, which by agreement was to stand as a security, and a case was to be made for the opinion of the Judges; and pending that matter, *Barker* brought his bill against the administrator of the son, and also against the administrator *de bonis non* of the father, setting forth the matter as above, and praying relief, and that he might not be doubly charged, and compelled to pay the same money twice.

The *Lord Chancellor* on a full hearing adjudged the note given to *Talcot* the son for the 31*l.* to be *quasi* a payment, and a good conversion in him, and that the same ought to

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go to his administrator, and not to the administrator *de bonis non* of the father.

In the arguing of this case was cited the case of *Norden* and *Levett*, where an administrator brought *trover* for goods, and recovered, and takes part in hand, and accepts a covenant for satisfaction of the residue; and the debtor afterwards failed. It was adjudged in the *King's Bench* to be a *devastavit* in the administrator, and the judgment was afterwards confirmed upon a writ of error in the House of *Lords*; and the *Lord Chancellor* cited a case adjudged by Serjeant *Pemberton*, when Chief Justice, where an executor of an obligee accepted a note drawn on a goldsmith for the money, the goldsmith accepted the bill, and before payment fails: The executor afterwards brought an action upon the bond, and this matter being given in evidence was adjudged a good payment. (1)

Sir *Tho. Jones's* Rep. 88. 2 Lev. 189. S. C. *A.* owes money to *B.* who dies, and his administrator takes *A.'s* covenant for the debt. *A.* becomes insolvent: this is a *devastavit* in the executor.

(1) Vide *Vernon* v. *Bouverie*, 2 Show. 296. *Cooksey* v. *Bouverie*, ibid. *Ward* v. *Evans*, 2 Salk. 442. So a bill drawn on *A.* to pay money for value received, is a good discharge of a debt, though not paid, unless returned by creditors in *convenient time*, *Durrach* v. *Savage*, 1 Show. 155. So where a merchant draws a bill upon a correspondent, (i. e. in favour of a third person) who accepts it, this is payment, for it makes him debtor to another person, who may bring his action, per *Parker*, Ch. Just. *Louviere* v. *Laubray*, 10 Mod. 37. So if executor takes an obligation in his own name for a debt due by simple contract to his testator, this shall charge him as much as if he had received the money, for the *new* security hath extinguished the *old right*, and is *quasi* a payment to him. Off. of Executor, 158, so said in a note given to the editor, but it does not appear there. But where executor delivers up bond due to his testator, and takes a new bond, with surety to himself for the debt; this, though a conversion at law, held to be none in equity, *Armitage* v. *Metcalf*, 1 Ch. Ca. 74. So executor investing the estate of his testator in the funds, or transferring stock from one fund to another *is* not a conversion, *Waite* v. *Whorwood*, 2 Atk. 159. As to the right of executor to bind the assets of his testator by any disposition of them, vide *Hill* v. *Simpson*, 7 Ves. 152. [*Taylor* v. *Hawkins*, 8 Ves. 209. *Macleod* v. *Drummond*, 14 Ves. 353. 17 Ves. 152. *Drohan* v. *Drohan*, 1 Ba. & Be. 185. *Ray* v. *Ray*, Coop. 264. *Keane* v. *Robarts*, 4 Madd. 332.]

GALE *versus* LINDO.

Case 464.

29 *Octobris. In Court. Lord Chancellor.*

A. on the treaty of marriage of his sister with *B.* lets her have 160*l.* privately, that her fortune might appear to be as much as was insisted on by *B.* and takes her bond to repay it. The executor of *A.* puts the bond in suit against the executor of the sister, who survived her husband. Upon a bill to be relieved, bond decreed to be delivered up as fraudulent.

THE case was, that when a marriage was treating between one *Gringer*, and the sister of *William Pitman*, the woman not having so great a portion as the man insisted upon, she prevails with her brother *Pitman* to let her have 160*l.* to make up her portion, and gave him bond for re-payment of it; and thereupon the marriage was had: and the husband, who knew nothing of the bond, died without issue, and his wife survived him, and afterwards died having made her will, and the plaintiff executor. *William Pitman* the brother dies, and makes the defendant his executor, who put the bond in suit against the plaintiff, as executor of the widow, to recover back the 160*l.* and thereupon he brings his bill to be relieved.

For the defendant it was insisted, that although this might be a fraud, as against the husband or any issue of his, who were to have the benefit of the marriage agreement; yet the husband being dead, and there being no issue, this bond is good against the woman herself, and by consequence against her executor, there being no creditors in the case, or any deficiency of assets pretended.

Lord Chancellor. You admit the husband might have been relieved on a bill brought by him and his wife; that which was once a fraud, will be always so; and the accident of the woman's surviving the husband will not better the case. Decreed the bond to be delivered up, and a perpetual injunction against it. (1)

Quære. If the condition of the bond had been, that in case the woman survived her husband, that she should repay it, whether she could have been relieved?

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(1) It appears that judgment had been obtained on the bond at law, on the record of which the defendant was ordered by the decree to cause satisfaction to be entered. Reg. Lib. 1687. A. fol. 221. Vide *Peyton* v. *Bladwell*, ante 240. *Drury* v. *Hooke*, ante 412. *Redman* v. *Redman*, ante 348, and cases there respectively cited. And note, "it is laid down as a rule in "equity that where a son, without the "privity of the father, or parent treating "the match, gives a bond to return or "refund any part of the portion, it is "void." Per *Comper*, Lord Chancellor, *Kemp* v. *Coleman*, Salk. 156.

GALE v. LINDO.

Note.—It was opened in this case, that after the death of the husband, the wife agreed to repay the money, and actually paid part. *Sed non allocatur.*

Case 465.

WILLIAMS *versus* SPRINGFEILD.

4 Novembris. In Court. Lord Chancellor.

Eq. Ca. Ab. 330, pl. 3. S. C.

Mortgagee assigns his mortgage for less than is really due to him. The mortgagor shall not redeem without paying the whole money due on the mortgage.

THE plaintiff had mortgaged the lands in question to *J. S.* who finding it was a slender security, and not worth the money due thereon, the plaintiff's wife, in case she should happen to survive her husband, having a right of dower in the mortgaged estate, *J. S.* agreed with defendant *Springfeild* to assign the mortgage to him for 100*l.* although there was 150*l.* then due to him thereon. The plaintiff now brought his bill to redeem, and the sole question was whether the defendant should be allowed all the money that was then really due on the mortgage.

Where there are subsequent incumbrances or creditors in the case, a man that buys in a prior incumbrance shall be allowed only what he really paid. But otherwise it is, as between him and the mortgagor or his heir.

Per Cur'. Where there are subsequent incumbrances or creditors in the case, there a man, that buys in a prior incumbrance, shall be allowed only what he really *paid*, though there was in truth a greater sum due: *(1) but* where the mortgagor himself or his heir comes to redeem, there is no reason that he should have the benefit of a good bargain made by another man, and ought therefore to pay what is really due on the mortgage, whatever it be, without respect to what the assignee paid: and decreed it accordingly. (2)

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(1) Quære, i. e. against such incumbrancers or creditors.

(2) The bill was by the assignee of the mortgagee. Reg. Lib. 1687. B. fol. 84. Sed vide *Morret* v. *Paske*, 2 Atk. 54. for observation of *Hardwicke*, Chancellor, on this case. Et vide *Darcy* v. *Hall*, ante 49. *Brathwaite* v. *Brathwaite*, ante 334. and cases there cited. *Phillips* v. *Vaughan*, ante 336. *Long* v. *Clopton*, ante 464. *Bromley* v. *Holland*, 5 Ves. 620.

FULTHROPE *versus* FOSTER. Case 466.

11 *Novembris. In Court. Master of the Rolls.*

A. conveys lands to *B.* who is put into possession, but under an agreement, that if *A.* pays the money in ten years, *B.* shall re-convey. The profits appearing to be much more than the interest, upon a bill by the heir to redeem, *B.* decreed to account for the profits, and not permitted to set the profits against the interest.

THE mother, who had an estate for life, joins with her son, who had the inheritance, in a conveyance of lands of 4*l. per ann.* and a profit out of some coal mines, which, *communibus annis*, were worth 9*l. per ann.* for 90*l.* The deed was absolute, and the vendee was immediately put into possession, but on a proviso, that if the son should * pay the money at the end of 10 years, the defendant should re-convey to the son.

The bill was brought by the son, to redeem; and the sole question was, whether the defendant should retain the profits in lieu of the interest, or should account for what he had received out of the estate. [* 477]

It was insisted, that the mother, who had parted with her estate for life, had the most reason to complain, and yet she was content the defendant should have the profits in lieu of the interest; that the son had a good bargain of it, for he had got to himself his mother's estate for life, and that this was but like the case of *Welch* mortgages, where the mortgagee is put into possession immediately, under a proviso to have a reconveyance on payment of the principal money; sometimes at a time prefixed, and often at any time whatsoever; and there the profit always goes against the interest. (1) That this case was stronger, by reason that the profits here arising out of the coal-mines were more uncertain than the profits of lands.

But the *Master* of the *Rolls* thought, that in this case the profits being 13*l. per ann.* it was altogether unjust and unreasonable, that the same should go in lieu of the interest of 90*l.* And as touching *Welch* mortgages, he thought, if the value was excessive, the court would decree an account, notwithstanding the agreement for retaining the profits in lieu of interest: and he thought the court would relieve against a *Bristol* bargain, to *wit*, where *A.* lends *B.* 1,000*l.* on a good security, and as to one 500*l.* it is agreed between the parties, that it should be repaid together with interest for it,

(1) Vide *Howel* v. *Price*, 1 P. Wms. 291. *Talbot* v. *Braddil*, ante 394. *Manlove* v. *Bate*, post 2 vol. 84.

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as it should become due; and as to the other 500*l.* that *B.* in consideration thereof, should pay unto *A.* 100*l.* *per annum* for *seven* years; and in the principal case he decreed a reconveyance on payment of what should appear to be due, discounting the profits received. (1)

(1) From the time of mortgagee's entry. Reg. Lib. 1687. A. fol. 141.

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DEERING *versus* HANBURY.

Case 467.

12 *Novembris. In Court. Master of the Rolls.*

A. by will gives the surplus of his personal estate to his daughter, whom he makes executrix, and willed, that if she died without issue it should go over to *B.* and that she should give security that if she died without issue it should go over accordingly. The devise over is void; but whether the directing a bond to be given, &c. does not alter the case?

J. S. by will having disposed of a term for years, whereof he was possessed, and bequeathed several legacies, devises all the rest of his estate (being chattels personal only) unto the defendant his daughter, whom he also makes executrix; but willed, that in case his said daughter died without issue, that the same should go over to the plaintiffs; and appoints that she should give security, that in case she died without issue, the estate should go over accordingly. (1)

(1) Where *A.* by his will says, "I "make *D.* my sole heir and executrix, "and if she die without issue, then to go "to *E.*" held the limitation over void, *Beauclerk* v. *Dormer*, 2 Atk. 308. Sed vide *Lampley* v. *Blower*, 3 Atk. 396, where the words *leave no issue* confine it to leaving no issue at the time of the death, *Sheppard* v. *Lessingham*, Amb. 122. So if the words are not plain, as in the case of *Beauclerk* v. *Dormer*, ub. sup. *Chamberlain* v. *Jacob*, Amb. 72, it is a more natural construction to make the limitation good, *Exel* v. *Wallace*, 2 Vez. 121. And that construction is as strong on a deed as on a will, ibid. So where bequest of residue of personal estate to *A.* and his heirs male, equally to be divided amongst them, *A.* took the whole for life, and then to go to his sons equally, *Wilson* v. *Vansittart*, Amb. 562, (no discussion.) But where by the devise the issue are to take as purchasers, there the first taker will have only an estate for life, *Knight* v. *Ellis*, 2 Bro. Ch. Rep. 570. And the distinction seems to be, that by the words of the bequest to *A.* and his issue, and on failure of issue to *B.* there is left a necessary implication of an estate tail in *A.* which by law gives him the whole interest in chattels personal; but where the testator, without leaving it to the necessary implication, gives the fund expressly to the issue, there the issue may take as purchasers, and then there is an end of the enlargement of any kind of the estate of tenant for life, ibid. 578. But the court would not imply an estate tail, *Vaughan* v. *Farrer*, 2 Vez. 187. *Doe on dem. of Lyde* v. *Lyde*, 1 Term Rep. 593. Et vide *Turner* v. *Moor*, 6 Ves. 557. So a bequest to *A.* and in case of her death amongst her children, held absolute in the first taker, *Webster* v. *Hale*, at the Rolls, 8 Ves. 410. But where devise of portions to four children payable at their respective ages of 21, or marriage, and in case any of them should die before the time of

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The bill was to compel the defendant to discover the estate, and to give security. The defendant demurred, for that the devise over was void, and that therefore she ought not to be enforced, either to discover the estate, or to give security.

The counsel for the plaintiff did admit, that had there been nothing more in the case, than a devise to the defendant and her issue, and in case she died without issue, it should go over to the plaintiffs; *that* would have been void, had the devise been of a term for years, and much more of chattels merely personal, as the principal case was; for where chattels personal are devised to one for life (that is, if the things themselves, and not the *bare use* thereof only, be devised) a devise over is void; and cited the case of *Whitmore* and *Chemish;* (1) but they took it, that the testator 2 Ch. Rep. 167.

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payment, or without issue, then his or her share to the survivor or survivors of them, one of them died under age, and without issue, the limitation, though of personal estate good, *Nicholls* v. *Skinner*, Pre. Ch. 528. But where devise of interest of money to one for life, and if he died without issue then the principal to go to another, on great consideration, the remainder over held good, *Smith* v. *Cleaver*, post 2 vol. 38, 59. So if the limitation of a personal chattel be confined within a life or lives, in being, or within ten months, or the birth of a child, or in case of his death before 21, or if limited on a contingency to a person who never takes, it is good, *Sheffield* v. *Lord Orrery*, 3 Atk. 287. Et vide on the subject of perpetuities at large, *Woodford* v. *Thellusson*, 4 Ves. 277. Et vide *Bigge* v. *Bensley*, 1 Bro. Ch. Rep. 187. *Glaver* v. *Strothoff*, 2 Bro. Ch. Rep. 33. *Everest* v. *Gell*, 1 Ves. jun. 286. From these cases, depending (as they appear to do) much upon construction, one general principle may, it is presumed, be gathered, namely, that the court will, in every case of this nature, feel a strong inclination to confine the words, dying without issue," to dying without issue at the time of the death, so that the limitations over may take place.

[The rules of construction upon this subject appear to be thus settled. 1. Both in devises of real, and bequests of personal estate, the words *dying without issue* in the absence of any qualifying expressions or circumstances must be construed according to their strict legal signification to mean dying without issue generally, *Barlow* v. *Salter*, 17 Ves. 479, so that in a bequest of personal estate the limitation over would be void. 2. In devises of real estate the words *without leaving issue* bear the same sense as *without issue; Dansey* v. *Griffiths*, 4 M. & S. 61. *Franklin* v. *Lay*, 6 Madd. 258: but, 3. In bequests of personal estate the words *without leaving issue* are to be construed without leaving issue at the death of the party referred to, and the limitation over will take effect. *Crooke* v. *De Vandes*, 9 Ves. 204. And see Note (*x*) to *Atkinson* v. *Hutchinson*, 3 P. Wms. 262, (6th edit.) where the cases on the subject are collected.]

(1) So *Gibbs* v. *Barnardiston*, Pre. Ch. 323. *Seale* v. *Seale*, ibid. 421. 1 P. Wms. 290, S. C. and cases cited in note there. [Those cases only decided that a remainder over of personal estate *after an estate tail* was void. A remainder of chattels personal after an estate for life was settled to be good in *Hyde* v. *Parratt*, 1 P. Wms. 1.]

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having made his daughter as well executrix as residuary legatee, and appointing her to give security for the purpose aforesaid, it made this a different case from those that had been put: and they took it clearly, that if a man by his will gave his estate to his executor upon condition, that the executor after his death should have his estate fairly appraised, and inventoried, and directs that his executor should within [479] *six* months give bond to *J. S.* conditioned to pay to *J. S.* such sum as the same should be appraised at, at the end of *ten*, *twenty* or *thirty* years after his death, that such conditional devise would be good; as would also the bond: and so they took it, it would be, in case the condition was to give bond to pay the value thereof to *J. S.* in case the executor should die without issue: and so in the principal case, though the devise over would not be good as to the personal chattels themselves, which were every day wasting and spending; yet the security would be good for the value thereof.

But it was observed by the defendant's counsel, that the security in this case by the will appointed to be given was not to pay the value of the estate, but that the estate itself should go over upon her dying without issue, which was repugnant and void in law: (1) for this in effect is to entail a bond, and should this be admitted, in time we should (as a judge upon the like occasion once expressed *himself*) entail old shoes.

The *Master* of the *Rolls* thought fit to save the benefit of the demurrer to the hearing: and appointed the defendant to answer as to the will, but not to discover the estate, unless the court should so think fit upon the hearing of the cause. (2)

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(1) Vide *Williams* v. *Williams*, Eq. Ca. Ab. 207, pl. 9.

(2) Reg. Lib. 1687. A. fol. 212. The defendant submitting to be examined on interrogatories for discovery thereof, as the court should see fit. No further account of the cause appears.

TOWERS *versus* DAVYS.

Case 468.
14 *Novembris.*
In Court.
Lord Chancellor.
Eq.Ca.Ab. 167, pl. 3. S. C.

THE plaintiff as heir at law brought a bill for the deeds and writings that concerned his estate; the defendant insisting, that she having a jointure of part, ought not to discover or part with her writings, until her jointure was confirmed.

The heir is not entitled to see any deeds in the hands of the jointress, without confirming her jointure, though the jointure was made after marriage.

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For the plaintiff it was insisted, the jointure was made after marriage, and not pursuant to any precedent articles, and was purely voluntary. (1)

Per Cur'. Confirm the jointure, or you shall not see the deeds. (2) But whereas the defendant insisted she was intitled to other part of the estate as administratrix, by reason of a lease for years, which had been heretofore made thereof, and she having by letter acknowledged, that the lease was intended to attend the inheritance, the Court compelled her to agree to relinquish all her pretensions to the lease, and unless she would so do, declared she should be ordered to produce all the writings without having any confirmation of her jointure. (3)

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(1) The settlement was made in consideration of 500*l.* portion. R. L.

(2) So *Petre* v. *Petre*, 3 Atk. 511, but a schedule ordered to be delivered, *Ford* v. *Peering*, 1 Ves. jun. 76, and it seems mortgagee cannot compel tenant for life to give up the title deeds, *Tourl* v. *Rand*, 2 Bro. Ch. Rep. 650. But if they happen to be in court they shall not be returned to tenant for life, to defeat or embarrass a title, per *Eldon*, Lord Chan. on pet. 4 Nov. 1802, not reported. [See *Webb* v. *Lymington*, 1 Eden, 8. *Duncombe* v. *Mayer*, 8 Ves. 320. *Noel* v. *Ward*, 1 Madd. 322.]

(3) The decree in this case was as follows, "Whereupon, &c. that the "defendant do produce all the deeds, "writings, and evidences, touching "and concerning the premises, and the "estates in question, or any part "thereof upon oath, before the Mas"ter, and what lands or tenements "thereby appear to be intended to be "settled by the said defendant's first "husband on her for a jointure, the "said defendant and her assigns are "to hold and enjoy the same accordingly, against the said plaintiffs, and "all claiming under them, and the "plaintiffs are thereby decreed to con"firm the same to defendant for her "life, the reversion and remainder to "plaintiffs in fee. And it is further "ordered and decreed, that the de"fendants do forthwith convey to the "plaintiffs, and their heirs, all the "rest of the estate and premises, "which are not in and by the said "deeds conveyed by the said *Hum*"*phrey Davys*, (defendant's first hus"band) and settled or intended for "the defendant's jointure, such con"veyance to be settled by the Master. "And it is further ordered and de"creed, that the said defendant do "come to an account for all the rents

" and profits received by her, or for " her use, of all the lands and pre- " mises not mentioned, or intended to " be settled upon her in jointure, if " any such there be, from the time " the plaintiffs exhibited their bill, and " that the Master do report thereon. " And after the Master's report, the " plaintiffs are at liberty to move for " the writings belonging to them as " they shall be advised." Reg. Lib. 1687. B. fol. 153.

Case 469. 15 *Novembris.* *In Court.* *Lord Chancellor.*

Sir WILLIAM CANN, Bart. *versus* DOM. ANN. CANN, Vid'.

A. on the marriage of his son covenants to settle lands to the use of the son for life, then to the wife for life, remainder to the heirs male of the body of the son. *A.* dies and makes his son executor, who dies and makes a second wife executrix. The grandson brings a bill against the executrix to have satisfaction on the covenant, or that he might sue it in the trustees' names. Bill dismissed, the plaintiff's father being tenant in tail, and might have barred the plaintiff if a settlement had been made.

William Cann, the plaintiff's grandfather, on the marriage of Sir *Robert Cann*, the plaintiff's father, settled the manor of *Breane*, in *Gloucestershire*, and other lands to the use of Sir *Robert* for life, then to his intended wife for life, remainder to the heirs males of the body of Sir *Robert*; and covenanted to purchase other lands of the value of 50*l. per annum*, and to settle them to the like uses. *William* the grandfather died, and left a considerable personal estate, and made Sir *Robert* his executor. Sir *Robert* levied a fine and thereby barred the entail of the settled lands, and by his will gave his estate to his son by the defendant, who was his second wife, and gave the plaintiff an annuity of 200*l. per annum* for life only, and that upon condition to release his executrix of all demands, which he refused to do, by reason that his father had in his life-time entered into a bond of the penalty of 12,000*l.* to leave the plaintiff 6,000*l.* at his death.

[481] The plaintiff's bill was that he, being the issue in tail, might have satisfaction made him on this covenant, or at least might have liberty to sue the covenant in the trustees' names; and it was said, that it was the more reasonable the plaintiff should take advantage of the covenant, in regard he was disinherited.

But it being insisted for the defendant, that this was a covenant of *William* the grandfather, and was broken in the life-time of Sir *Robert* the plaintiff's father, who thereby became intitled to the damages on that covenant; and the plaintiff's own bill was, that Sir *Robert* as executor to his

father had out of his personal estate retained a satisfaction for the non-performance of this covenant; and that in case the lands had been purchased and settled according to the covenant, yet it had the next day been in the power of Sir *Robert* to have barred the entail by levying of a fine, or suffering a common recovery; and that therefore there was no reason now to carry this covenant into an execution in equity for the benefit of the plaintiff, the issue in tail, and that against the executrix of an executor: the court was clear of an opinion, that in regard Sir *Robert* had been tenant in tail, in case this settlement had been actually made, and so might have barred the estate, the next day, as he hath done all other the intailed lands; that the plaintiff ought not to be relieved as touching that covenant, but dismissed that part of the bill. (1)

And the bill being also to have satisfaction for a legacy of 50*l.* devised to the plaintiff by *Humphrey Hooke* his grandfather, in 1658, and another legacy of 100*l.* which was devised to the plaintiff by *Cicely Hooke*, his grandmother, in 1660, both which had been received by his father, it was insisted for the defendant, that the plaintiff had received ample satisfaction for these legacies from his father in his lifetime; and more particularly that the bond of 12,000*l.* entered into by Sir *Robert* to leave the plaintiff 6,000*l.* at his death, was in time long after he had received these legacies; and that all the plaintiff's demands must naturally be intended to be included in this bond; and that besides all this, the plaintiff in answer to a cross-bill had insisted on the statute of Limitations.

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Lord Chancellor. I will do all I can to help an heir that is disinherited; and you shall be allowed nothing more than what you can prove to have been actually paid towards satisfaction of these legacies; and *eo nomine*, as in part of the legacies, and shall pay the residue with interest. (2)

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(1) "And it appearing that the "plaintiff having made his election to "accept of the moneys secured by the "said bond (i. e. the bond in the "penalty of 12,000*l.*) which since "the commencement of this suit have "been paid unto him by the said de-"fendant, and bond delivered up, and "the legacies with interest as afore-"said, and not to accept of his legacy "of 200*l.* per annum," the decree was, "That the plaintiff should for "ever be barred of the said legacy of "200*l. per annum*," no costs on either side. Reg. Lib. 1687. A. fol. 80.

(2) Where lands and personal estate devised in trust to *A.* charged *int. al.* with 500*l.* to the daughter of *A.* The daughter marries, and *A.* gives 1,500*l.* portion, but no mention of 500*l.* legacy,

nor any release or discharge taken for it, and after twenty-one years, on bill brought, presumed that 500*l.* satisfied by the portion. *Macdowall & Ux'* v. *Halfpenny*, post 2 vol. 484.

Case 470.

16 *Novembris.*

In Court.

Lord Chancellor.

GOSLING *versus* DORNEY.

Where lands are devised for payment of debts and legacies, the debts and legacies shall be paid *pari passu.*

1 Ch. Rep. 248.

WHERE land is devised to be sold for payment of debts and legacies: (1) the *Lord Chancellor* was of opinion, that the debts and legacies should be paid in equal proportion, without any preference to the debts: and so it was resolved in the case of Sir *John Bowles* by the Lord *Nottingham*, that debts and legacies should be paid *pari passu;* but the Lord *North* reversed that decree, and gave preference to the debts: and so the Lord *North* likewise in the case of *Hixon* and *Witham*, decreed the debts to be first paid; but the *Lord Chancellor* declared he was not satisfied with that opinion, but would consider of it. (2)

(1) The words of the will, as stated in the Register's Book are, "And testatrix particularly directs, that the "charges of her funeral and probate "of her will be first paid, then that "her trustees be fully indemnified, "next that the debts, and after that "her legacies be paid, and the surplusage (if any) to her two sisters, "&c."

(2) The decree is, "That the money "to be raised by sale of the lands and "profits thereof till sale be applied "in discharge of the debts, each creditor and legatee to come in for "satisfaction of their debts and legacies, share and share alike, *pro rata*, "without any regard to the nature of "the securities." Reg. Lib. 1687. A. fol. 49. So where *A.* made executor, and then devise *to* him and his heirs upon trust to sell, *Anon.* post 2 vol. 133. Sed vide *Greaves* v. *Powell*, post 2 vol. 248, where the trustees were also executors. Et vide Eq. Ca. Ab. 141, pl. 3. *Girling* v. *Lee*, ante 63, and cases cited in not. there. It has, however, long been settled, that debts should be paid before legacies out of equitable assets, or where the fund is merely a trust, vide *Maylin* v. *Hoper*, Ca. temp. Hardwicke, p. 206, 9. [*Kidney* v. *Coussmaker*, 12 Ves. 154.]

LADY SHORE *versus* BILLINGSLY.

Case 471.

Eodem die.

Eq.Ca.Ab. 243, pl. 2. S. C.

Surplus of a personal estate bequeathed to *A.* and *B.* It is a joint devise, and shall survive. There are two executors, and one dies, his executor or administratator shall not have an account against the survivor. 1 Ch. Rep. 238.

A MAN having devised the surplus of his estate after his debts paid to *A.* and *B.*, *A.* dies. (1) It was adjudged in the *Delegates*, and decreed by the Lord *North*, and now confirmed by the *Lord Chancellor*, that this was a joint devise, and should survive to *B.* (2) and the *Lord* * *Chancellor's* opinion was, that if *A.* and *B.* had been made executors, and *A.* had possessed a moiety of the goods and died, it would have been all one: and the case of *Cox* and *Quaintont* was cited, where there were two joint executors, and one died; adjudged his executor or administrator should not have an account against the survivor. (3)

vivor.

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(1) By the will in the Commons it appears, that *A.* and *B.* are mere residuary legatees, and the printed report said to be correct, *Stuart* v. *Bruce*, 3 Ves. 632. There are several entries of the name; but the editor has not been able to find any entry of the above case in the Register's Book.

(2) Vide *Cock* v. *Burrish*, ante 425.

(3) So *Webster* v. *Webster*, 2 P. Wms. 347. *Cray* v. *Willis*, ibid. 529. Vide note to *Hamell* v. *Hunt*, Pre. Ch. 164. In *Perkins* v. *Baynton*, 1 Bro. Ch. Rep. 117., a distinction is taken between bequest to executors and to persons not executors, but that appears to have been merely a dictum on a point not directly before the Court, and the doctrine that an interest given to two or more, by way of legacy, (as well as otherwise) is joint unless there are words of severance, is now clearly established, *Morley* v. *Bird*, 3 Ves. 628. *Stuart* v. *Bruce*, ibid. 632. Note.—In the case of *Stuart* v. *Bruce*, the words of the bequest are, "and in case the said mo- "ther shall prove again with child, it "is my pleasure that the whole of my "estate be divided equally between "the mother and the children." Et vide on this subject more particularly, *Kew* v. *Rouse* and *Ux'*, ante 353, and cases cited in not. there.

WHALEY *versus* NORTON & Al'. (1)

Case 472.

'18 *Novembris.*

In Court.

Master of the Rolls.

Eq. Ca. Ab. 87, pl. 5.

Bill to be relieved against a bond to pay 400*l.* to a woman whom the plaintiff kept as a mistress. Relief denied.

THE bill was to be relieved against a bond and judgment, defeazanced for the payment of 400*l.* to the defendant; and the bill charged, that whereas the security recited 400*l.* to have been lent and paid by the defendant to the plaintiff, that in truth the money was never really lent or paid: the

(1) Cited in *Hill* v. *Spencer*, Amb. 642.

WHALEY v. NORTON.

defendant by answer confessed, that the 400*l.* was not lent or paid by her, and that it was never meant or intended so to be, and that it was the mistake of the scrivener in making the security after that manner, for that the 400*l.* thereby intended to be secured was the free gift of the plaintiff unto the defendant.

The truth of the case was, that the defendant was for some time kept by the plaintiff, and this 400*l.* was given her upon that account; but of that no notice was taken in the bill, and the counsel for the defendant insisted, that it being a free gift, no equity could relieve against it; and cited the case of *Bourman* and *Uphill*, which was this very case in point, and the equity laid in the bill the same, *to wit*, that it purported to be a security for money lent; whereas no money was really lent or paid: and the Court would not relieve in that case, though the gift was upon the like account: and the case of *Peacock* and *Mainklin* was also cited.

The *Master of the Rolls* said, that there would be a difference in these cases between a contract executed and executory; and that this Court would extend relief as to things executory, which if done, it may be might stand: but as this case was, he saw no ground to relieve the plaintiff, nothing appearing to him, but it was a free and voluntary gift, without any thing of *turpis contractus*: (1) and in case it had been so, yet we know that *Adam* was punished, though tempted by *Eve*; because he would be tempted.

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But otherwise it had been, if the obligee was a common strumpet. (2)

But if it had been charged in the bill, that the defendant was a common strumpet, and she commonly dealt and practised after that sort, and used to draw in young gentlemen,

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(1) So where a bond given by *A.* to his housekeeper for secret service, *Bainham* v. *Manning*, post 2 vol. 242. But such a bond shall be postponed to simple contract debts, but paid before legacies, *Jones* v. *Powell's* case, Eq. Ca. Ab. 84. *Cray* v. *Rooke*, Ca. temp. Talbot, 153. So any voluntary bond, though good against executor, shall be postponed to simple contract debts, *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 222. Et vide *Marchioness of Annandale* v. *Harris*, 2 P. Wms. 432. Et vide as to a bill filed in such a case by an executor, *Mathew* v. *Hanbury*, post 2 vol. 188. [See further as to bonds of this nature, *Franco* v. *Bolton*, 3 Ves. 368. *Gray* v. *Mathias*, 5 Ves. 286. *Gilham* v. *Locke*, 9 Ves. 612. *Hunt* v. *Mansell*, 1 Dow, 211. *Matthews* v. *L——e*, 1 Madd. 558. *Binnington* v. *Wallis*, 4 B. & A. 653. *Knye* v. *Moore*, 1 S. & S. 61. 2 S. & S. 260. 6 B. & C. 133, nom. *Nye* v. *Moseley*.]

(2) So it is sufficient to put in issue a general charge of lewdness, under which particular evidence may be given, *Clarke* v. *Periam*, 2 Atk. 337. *Robinson* v. *Cox*, after Trin. Term. 1741. there cited. [*Wheeler* v. *Trotter*, 3 Swan. 174. n.]

in such case he thought it reasonable the Court should relieve; and the plaintiffs had, in this cause, proved as much; but the defendant's counsel opposed the reading to that matter, by reason it was not charged in the bill, nor in issue in the cause; so they prayed liberty to amend their bill, and to charge that special matter, paying the costs of that day, and of the depositions taken in the cause. (1).

WHALEY v. NORTON.

But then it must be so charged in the bill, and put in issue; for otherwise, if it is so proved, the depositions cannot be read.

(1) And it seems to be a pretty general rule that a party cannot examine to any thing which is not put in issue in the cause: [*Sidney* v. *Sidney*, 3 P. Wms. 276. *Clarke* v. *Turton*, 11 Ves. 240. *Blake* v. *Marnell*, 2 Ba. & Be. 47.] vide *tamen* the case of *Hodgson* v. *Thornton*, adjudged Hil. 1702, where the defendant, on presenting the plaintiff to a living, took a bond from him to resign, and afterwards put it in suit, and recovered and levied 98*l.* and the plaintiff's bill was for relief; the defendant did not by answer pretend any misbehaviour in the plaintiff, yet examined to several instances of misbehaviour; and then it was urged that these depositions could not be read, because the subject matter of them was not in issue. And the *Lord Keeper* was at first of that opinion, but afterwards allowed them to be read, and founded his decree on them. Eq. Ca. Ab. 228, pl. 5.

JOHN WALLEY, an Infant, *per prochein amy* . . . . . } Plaintiff;

and

PETER WALLEY, THOMAS GAUDY, ROBERT WARNER & Al' . . . } Defendants.

Case 473.

19 *Novembris.*

In Court. Lord Keeper.

FRANCIS WALLEY, the plaintiff's grandfather, being, amongst other things, possessed of several messuages and tenements at *Mile-end* in *Stepney*, in *Com. Middlesex*, for a term of 40 years, in which there was at his death about 35 years to come, which he held by lease from *Clare-hall* in *Cambridge*, and which messuages were worth about 90*l.* *per ann.* over and above the rent reserved on the lease, and being so possessed and of other personal estate, in *November*, 1671, he made his last will and testament, and thereby devised several legacies amounting unto about 60*l.* and then devises in these words, *viz.* Item, *all the rest and residue of my lands, houses, tenements, goods, chattels, household-stuff, and plate, jewels, and whatsoever else belongs to me in*

Eq. Ca. Ab. 332, pl. 7.

An executor in trust for an infant residuary legatee renews a lease, part of the testator's personal estate in his own name, and having mortgaged it, assigns the equity of redemption to a trustee to sell for payment of his own debts. The trustee sells to one who had notice of the infant's title. Purchase set aside.

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this world, as well that which is unnamed, as that which is named, I give and bequeath unto my loving grandchild John Walley *the younger*, (to wit the plaintiff) *and I do make my son-in-law* John Walley (to wit the plaintiff's father) *executor in trust for my said grandchild* John Walley. Afterwards, in 1677, the testator died, and *John Walley*, the father, proves the will, possesses the personal estate, and in *March*, 1678, surrenders the old lease, and takes a new lease from *Clare-hall* in his own name for the same term as was unexpired of the old lease, and without payment of any fine or other consideration; and having so done, he mortgages part of the estate to one *Williams* for 200*l.* which mortgage by mesne assignments was come down to the defendant *Seymour* in trust for *Gaudy*, who had lent a further sum of 350*l.* on a security by way of mortgage of the premises: after this, *John Walley*, the plaintiff's father, makes an assignment of his equity of redemption to the defendant *Peter Walley* upon trust to sell and dispose of the premises for payment of his debts, and then goes beyond sea as a common soldier to the *Indies*, in the service of the *East India* Company. The defendant *Warner* being a sea captain, and having got a sum of money together, employs one *Peters*, a scrivener, to find him out a purchase, who informs him of the estate in question, and brings *Peter Walley*, the trustee, and *Warner* together, and *Warner* contracts with *Walley* to purchase the premises at the price of 870*l.* and pays off *Gaudy*, and takes an assignment of his mortgage.

The plaintiff's bill set forth the matter, *ut supra*, and charged that *Gaudy*, before he lent his money, as also *Warner* before he had paid any part of his consideration money, had full notice of the plaintiff's title, and that his father was only executor in trust for him; and therefore prayed an account of profits, and to be let into possession, and to have the new lease assigned.

[486] *Gaudy* by answer confessed, that he had notice before the lending of the money; but that he was at the same time told, that *Walley*, the grandfather, died greatly indebted, and that his executor was in disburse 500*l.* and more for the payment of his debts, and set forth what profits he had received during the time he was in possession: and that he had accepted of what rested due on his mortgage from *Warner* the purchaser, and had thereupon assigned the same unto him.

Warner set forth his purchase, and that he had paid off *Gaudy*, and taken an assignment of his mortgage, and that

he had not yet paid the residue of his purchase-money; but had given a note for it to *Peter Walley*, the trustee, (1) and denied he had notice of the plaintiff's title before his purchase. (2)

The cause coming this day to be heard, and it being fully proved, that *Warner* had notice before any of his purchase-money was paid, or deeds executed, and that the will of *Walley* was read over both to him and *Peters*, the scrivener, before his purchase: it was insisted by his counsel, that he ought notwithstanding to have the benefit of *Gaudy's* mortgage: for that it was not proved in the cause, that *Gaudy* had notice before he lent his money; and though *Gaudy* had by answer confessed notice, yet that could not bind *Warner*, the purchaser; but that the plaintiff might have examined *Gaudy*, *de bene esse*, against *Warner*, to have proved the notice; and that *Gaudy* being before the court, the plaintiff might take a decree against him for that money. But it was answered, that *Warner* having purchased with full notice, he stands affected with the trust, and cannot defend himself as an innocent purchaser; and though *Gaudy's* answer cannot be read against him as evidence; yet if he would mend his case, on pretence that *Gaudy* had no notice, he then must stand in *Gaudy's* place, and *Gaudy's* confession of notice, as to the title he derives from *Gaudy*, will bind him; and *Gaudy* cannot transfer to *Warner* a better right than he himself had, and he confesses he came in with notice; (3) [487] and *Warner's* counsel then prayed, in regard that *Gaudy* was a defendant before the court, that the plaintiff might take his decree against *Gaudy* for the money paid to him by *Warner*, the purchaser.

The Court decreed the plaintiff should be let into possession, and have the benefit of the new lease, and an assignment thereof from the defendants, and an account of the

(1) Where a man purchases an estate, pays part, and gives bond to pay the residue of the money, notice of an equitable incumbrance, before payment of the money, though after the bond is sufficient, *Tourville* v. *Naish*, 3 P. Wms. 307.

(2) The defendant must deny notice, *at or before the execution of the purchase deeds*, *More* v. *Mayhow*, 1 Ch. Ca. 34. *Fitzgerald* v. *Burk*, 2 Atk. 397, where it is stated (it should seem by mistake) that the plea was allowed. *Story* v. *Lord Windsor*, ibid. 630. So plea to a bill that money is paid, or *bonâ fide* secured to be paid is not sufficient, as the money may, notwithstanding, never be paid, *Hardingham* v. *Nicholls*, 3 Atk. 304.

(3) *Bovey* v. *Smith*, ante 149. *Pye* v. *Gorge*, 1 P. Wms. 128. *Saunders* v. *Dehew*, post 2 vol. 271. Bacon's Tracts, 312.

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profits, for what each defendant had respectively received:(1) but with this, that the Master should also take an account of the personal estate of *Walley*, the plaintiff's grandfather, and what the plaintiff's father paid for the debts and legacies of *Walley*, more than what the other personal estate of *Walley* would amount unto, should be allowed upon the account; and *Warner* should be likewise allowed what he had laid out in lasting improvements upon the premises, (2) though they were made pending the suit; (3) and that *Peter Walley* should deliver up to *Warner* the note or bill he gave for the payment of the residue of his purchase-money, and *Warner* was left at liberty to bring his bill against *Gaudy* for the money he had paid to him on the assignment of his mortgage. (4)

2 Ch. Rep. 115.

In the arguing of this case was cited the case of *Culpepper* and *Aston*, wherein it was settled, that where trustees are appointed to sell lands for the payment of debts, the sales by them made of what was more than sufficient for the payment of debts are not good.

Vide ante, Case 297, contra.(5)

A necessary defendant being beyond sea, upon affidavit made thereof, and that plaintiff knew not whether he was living or dead, he had an order upon motion to proceed against the other defendants without prejudice, and afterwards had a decree without bringing such defendant to hearing.

Note. In this case the plaintiff's father, who was the executor in trust, being gone to the *Indies* as a common soldier in the service of the *East India* Company, and the plaintiff making affidavit of that matter, and that he knew not whether his father was living or dead, nor where to find him to serve him with process, it was upon a motion ordered, that the plaintiff might proceed against the other defendants without prejudice, for not bringing his father to hearing; (6) and the plaintiff had the decree *supra* without bringing his father to hearing. (7)

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(1) During the time the said premises were in their respective possessions. R. L.

(2) Repairing, building, or necessary improvements. R. L.

(3) These words not in the Register's Book. And the said defendant, *Gaudy*, was to be allowed what he had laid out on the premises. R. L.

(4) And also the sum of 30*l.* and a guinea-piece, received by him in part of the purchase-money, and *Peter Walley*, the trustee, was likewise to account for so much of testator's other personal estate, as had come to his hands. R. L.

(5) So as to legacy, but the heir shall have the surplus, *Randall* v. *Bookey*, post 2 vol. 425. Pre. Ch. 162, S. C. *Anon.* 2 Vent. 359. *Starkey* v. *Brooks*, 1 P. Wms. 390. [And *Culpepper* v. *Aston* agrees with these cases. It is totally mis-stated in the text.]

(6) Vide *Heath* v. *Percival*, 1 P. Wms. 684.

(7) This does not appear in the Register's Book. Reg. Lib. 1687. B. fol. 81.

WILLETT *versus* WINNELL.

Case 474.

Eodem die. In Court. Lord Chancellor.

Eq.Ca.Ab. 313, pl. 14. S. C.

THE plaintiff was the youngest son of his father, who was seised, according to the custom of the manor of *Wolverly*, of a copyhold tenement of the nature of *Borough English* of the value of 15*l.* *per annum*; and in *April* 1671 the plaintiff's father having borrowed 200*l.* of the defendant's father, for securing the same made a conditional surrender into the hands of two customary tenants of the manor, to be void on payment of the 200*l.* and interest in *April* 1672: and at the same time the defendant's father entered into a bond, conditioned that if the 200*l.* and interest should not be paid at the day, then if the defendant's father should pay to the plaintiff's father, his executors, administrators or assigns, the further sum of 78*l.* in full for the purchase of the premises within *ten* days afterwards, that the bond should be void, or otherwise stand in full force.

The plaintiff's father died in *November*, 1671, before the mortgage was forfeited, leaving the plaintiff an infant of *two* years old; and the 200*l.* with interest not being paid at the day, the defendant pays the 78*l.* the next day after the mortgage was forfeited, to the administrator of the plaintiff's father, according to the condition of the bond.

The plaintiff's bill was to redeem, on repayment of the 200*l.* with interest, discounting the profits. The defendant by answer insisted it was an absolute purchase.

The Court decreed a redemption, making no doubt but it continued a mortgage, and was not an absolute purchase: but as to the 78*l.* declared that to be well paid to the administrator, and therefore ordered the whole moneys, with interest, to be repaid and costs, discounting the mesne profits. (1)

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(1) "Received, and which, without his wilful default, might have been received by the said defendant." Reg. Lib. 1687. B. fol. 152. It is a general rule, once a mortgage, and always a mortgage, sic dict. *per Cur'*, *Newcomb* v. *Bonham*, ante 8. Vide *Jennings* & *Others* v. *Ward*, post 2 vol. 520. And the principle seems to be, that the equity of redemption may not be clogged by any bye agreement, *Bowen* v. *Edwards*, 1 Ch. Rep. 222. *Croft* v. *Powell* & *Al'*, Comyn's Rep. 603. *Exton* v. *Greaves*, ante 138.

Case 475. EDWIN *versus* THOMAS.

25 *Novembris. In Court. Lord Chancellor.*

Eq.Ca.Ab. 378, pl. 5. S. C.

THE bill was to be relieved touching the trust of a copyhold estate. In the debate of this case it was alleged, and so it appeared by an ancient book of survey, that by the custom of the manor of which the estate was held, copyhold land there should not only go to the youngest son, but also in case the youngest son died without issue, it should go to his youngest brother and not to the eldest; and if no sons, that it should go to the youngest daughter; and likewise that if the copyholder had had several wives, the lands should go to the youngest son by the first wife. And the principal question in this case being, whether upon the death of the youngest son it should go to his next youngest brother or to the eldest, the *Chancellor* directed an issue for trial of the custom. (1)

Rent-charge in fee granted out of gavel-kind land shall descend in gavel-kind.

In speaking to this case, the *Chancellor* cited a case adjudged by the Lord Chief *Justice Hale*, that a rent charge created *de novo* issuing out of gavel-kind lands should follow the nature of the land, and descend in gavel-kind. (2)

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(1) So if a lease be made to *H.* and his heirs, for three lives, of lands of the nature of *Borough English*, this shall go to the youngest son, though a new created estate, for the custom is inherent to the land, *Clements* v. *Scudamore*, Salk. 243. So it is in rent, for it issues out of the land, ibid. Vide also *Baker* v. *Bayley*, post 2 vol. 226. *Randall* v. *Writtle*, 2 Lev. 87., more fully reported under the name of *Randall* v. *Jenkins*, 1 Mod. 96. 1 Inst. 169 b.

(2) Reg. Lib. *1687.* A. fol. 162. This issue was afterwards found against the plaintiff, but it being alleged to be a cause of value, and to concern all the copyholds in the manor, a new trial was directed on payment of costs, vide post 2 vol. 75. S. C. Et vide *Fitton* v. *Earl of Macclesfield*, ante 293, where said arg. that it was not proper on one trial in ejectment to bind up a title at law by decree in this court.

Case 476. SIR BAZIL FIREBRASSE *versus* BRETT.

26 *Novembris. In Court. Lord Chancellor.*

Injunction granted for stay of proceedings at law for forcibly taking from defendant money which he had won of the plaintiff at play, though the defendant had by answer denied all the circumstances of fraud charged in the bill.

THE defendant and Sir *William Russell* dining with the plaintiff at his house, after dinner fell into play with the plaintiff, and won of him in ready money about 900*l.* which *Brett*

brought away with him (though when they began to play the defendant and Sir *William Russell* had not above eight guineas between them) and Sir *Bazil* being somewhat inflamed with wine brought down a bag of guineas containing about 1,500*l.* and *Brett* won that money also, and had it in his possession; but as he was going away with it out of the house, *Firebrasse* and his servants seized upon it and took it from him. *Firebrasse* had brought an information against *Brett* for playing with false dice; but *Brett* was acquitted: and *Brett* had brought an action of trespass against *Firebrasse* for taking from him in a forcible manner this bag of guineas, and thereupon *Firebrasse* exhibited his bill, charging many circumstances of fraud and circumvention, which were denied by the defendant's answer; (1) and upon the plaintiff's motion the *Lord Chancellor* (2) granted an injunction till the hearing of the cause, and said, that he thought the sum very exorbitant for a man to lose at play in one night, and that if it was in his power he would prevent it; and cited the case of Sir *Cecil Bishop* and Sir *John Staples*, in the Lord Chief Justice *Hale's* time, about a wager upon a foot race, and that the *Chief Justice* in that case said, that those great wagers *proceeded from avarice, and were founded in corruption.* (3)

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(1) The answer confessed the money was won at play, but said it was won fairly. R. L.

(2) Considering the circumstances of the case, the greatness of the sum, and that it was confessed to be won at dice. R. L.

(3) Reg. Lib. 1687. A. fol. 219. Entered *Firebrace* v. *Russell*, vide post 2 vol. 70. 16 Car. 2. cap. 7. 9 Anne, cap. 14. 18 Geo. 2. cap. 34. The two following cases, in the Exchequer, on the statute of Anne and Geo. 2. are not reported, *Mynd* v. *Ogden*. *Mynd* v. *Payne*, 26th January, 1791. These were bills filed by a comon informer, under the stat. 9 Anne, cap. 14. and 18 Geo. 2. cap. 34. for a discovery of money won by gaming, and for a decree for the penalties. To one of the bills the defendant demurred to the relief only; to the other the defendant demurred to all the discovery, except as to a single interrogatory, and to the relief. The question was, whether a common informer was entitled to a discovery, and decree as well as relief, per *Eyre*, Lord Chief Baron.—" If this were a mo- " dern act of parliament I should have " no doubt but that the informer was " entitled to a discovery, but if such a " bill by a common informer is new, I " shall pause before I decide it, for " silence, during so long a time, may " have given an interpretation to the " acts: the common informer is not " included in the stat. 18 Geo. 2. not " because the case of the common in- " former is not stated with the case of " the party in the preamble of the act, " (as to the operation of the preamble " on the construction of an act of par- " liament, vide *Copeman* v. *Gallant*, 1 " P. Wms. 317. 320. *Ryall* v. *Rolle*, " 1 Atk. 175. 182. 1 Vez. 365. 371. " S. C.) but because such a construc- " tion would put a court of equity

" upon giving penalties, which is be-
" yond the nature of a civil right. As
" to the relief, the common informer
" has no ground to proceed here; the
" relief prayed too is bad, because it
" is prayed for the informer and the
" King, whereas by the stat. of Anne,
" it is given to the informer and the
" poor of the parish. The demurrer
" to the relief must be allowed: but
" the demurrer, which goes to the re-
" lief and discovery must be over-
" ruled; for a demurrer cannot be al-
" lowed in part." The other Barons concurred. *Burton* for the defendant contended, that if the present demurrer were bad, yet the defendant might demur *ore tenus* to the relief only, but the Court thought that to demur *ore tenus*, there must be a new cause of demurrer, whereas in the present case it would be a demurrer for the same cause, though not so extensive. *Pritchett* v. *Panton*, 1 June, 1791; this was a bill filed by a common informer for a discovery and payment of a penalty, for playing at an unlawful game; no game was mentioned, but it was averred that a penalty had occurred: defendant demurred. *Hall*, for the plaintiff, argued, that the Court would infer that the game played was an unlawful game, within the statute; but per *Eyre*, Lord Chief Baron—" We shall infer no such " thing, there are many unlawful games, " not within the stat. 9 Anne, besides " the penalty arises from the sum lost, " and not from the game. You must " set out more specific, as that at *such* " *a time* you lost *such a sum of money;* " you are not entitled to this kind of " fishing bill to enquire if *at any time* " *in his life*, a man has played at an " unlawful game." And it is clear, that a bill for discovery of money won at play, under the stat. of Anne, by a common informer will not lie, till he has commenced some suit for relief, *Mynd* v. *Francis*, 1 Anstr. 5.

Case 477.

WILLETT *versus* EARLE.

At the Rolls. Master of the Rolls.

Eq.Ca.Ab. 144, pl. 18. 3 Lev.267. S.P.

Upon a special report, the point in question was, whether an executor, who had paid the arrears of rent reserved upon a parol lease incurred in the life-time of the testator, had well paid and administered this money, so as to bar the plaintiffs, who were creditors by bond.

Rent incurred in the lifetime of a testator, though reserved upon a parol lease, shall be paid before bond-debts.

The Court was of opinion, that this rent, though upon a parol lease, did partake of the realty, and therefore to be preferred to debts upon bond; and that the executor had well applied and duly administered the assets: and the case of *Phillips* v. *Creech*, was cited, where it was so adjudged in the *Common Pleas*, 32 *Car. II.* (1)

(1) Rents are of an equal nature, whether the demise be by parol or by deed, and neither is to be preferred to a debt by specialty, on the other hand a debt by specialty is equal, but not superior to rents, therefore an executor may plead payment, or recovery of one against another. But in debt for rent he cannot plead there is a bond due, nor *vice versa*, per *Holt*, Chief Justice, *Gage* v. *Acton*, Comyn. Rep. 67. Lord Raym. 515. Salk. 325. S. C. *Newport* v. *Godfrey*, 4 Mod. 44. 2 Vent. 184. S. C. *Stonehouse* v. *Ilford*, Comyn. 145.

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If on such parol agreement for a lease any consideration had been paid, equity would restore the consideration, though it did not execute the agreement in specie 159

There is a difference between money laid out in necessary repairs, and lasting improvements, and money laid out for fancy and humour; the former shall be allowed, though not the latter. Sed vide note 159

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The husband by articles before marriage, covenants to add 500*l.* to his wife's portion of 500*l.* and that it should be laid out in land and settled on the wife, and the issue of the marriage; the husband, without the trustees' consent, lays out the money in a fine house and garden; allowed a sufficient performance of the covenant 345

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Upon a treaty of marriage between *A.* and the daughter of *B.*, *A.* being indebted 200*l.* by bond, *B.* would not consent to the match; to remove which objection, the brother of *A.* takes up *A.*'s bond, and gives his own in the room of it, and privately takes a counter-bond from his brother to indemnify him; and the daughter of *B.* is privy to this, and encourages it. *A.* dies, the wife takes administration, and was relieved against this counter-bond, though a party to the fraud 348
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Settlement in bar of all the wife's demands out of her husband's personal estate, by the custom of the province of *York* or otherwise, will bar the wife of her distributive, as well as customary part 15
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A man indebted by several mortgages, judgments, bonds, and simple contracts, settles his estate, for payment of his debts. The real securities shall be first paid, and then the bond and simple contract debts in an average 101

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A man before marriage covenants with his intended wife, that she should have power to dispose of 300*l.* of her estate, notwithstanding the marriage; whether this covenant is discharged by the marriage ibid.

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A debt is owing by bond with sureties, and another debt on simple contract; afterwards an account is stated of what is due for both debts, and one balance drawn, and a bill of sale is made for securing the balance: the money received on the bill of sale shall be applied towards discharge of both debts in proportion 34

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A. on his marriage agrees and gives bond to settle particular lands on his wife and their issue, and after wards sells part of the lands; jointress decreed to have the deficiency of her jointure made good out of the inheritance of the lands remaining unsold; but that decree reversed, for it would be an hardship on the issue, to make them bear the whole loss, who ought only to bear a proportion 440

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Where two become jointly interested in any thing by way of gift, the same shall be subject to all the consequences of law, and survivorship shall take place; but otherwise it is of a joint undertaking in a way of trade ibid.
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the nephews died in the testator's life-time: the surviving nephew shall have the whole, the later words, by which the surplus is appointed to be laid out for the benefit of the nephews, being joint 425

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